



ADMINISTRATIVE REVIEW COUNCIL

THE SCOPE OF JUDICIAL REVIEW

DISCUSSION PAPER

2003

How to make comments and submissions

You are invited to make comments and submissions in response to this discussion paper. These should be sent to:

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ISBN: 0 642 211779

Cover designed by the Attorney-General's Department.

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CONTENTS

SCOPE OF JUDICIAL REVIEW DISCUSSION PAPER EXECUTIVE SUMMARY	1
Structure of discussion paper	1
PART I - INTRODUCTION.....	7
SECTION I.....	7
The Council	7
The project	8
Timing of the project	8
SECTION II	9
What is judicial review?.....	9
Further aspects of judicial review	10
Judicial review at common law and under the Administrative Decisions (Judicial Review) Act 1977	10
Grounds of review	11
SECTION III.....	13
Limits on the scope of judicial review	13
Judicial limits	13
Legislative limits - the AD(JR) Act	13
Other ways in which judicial review has been legislatively limited	14
Legislative schemes with comprehensive alternative review schemes.....	17
Non-legislative means of limiting review - privatisation/outsourcing	17
SECTION IV.....	18
Previous Council involvement in consideration of the scope of judicial review	18
PART II - THE SIGNIFICANCE AND CONSTITUTIONAL SCOPE OF JUDICIAL REVIEW.....	23
SECTION I.....	23
The significance of judicial review	23
An element of the rule of law	24
An aid to accountability	24
Consistency and precedent.....	25
An individual right.....	25
Previous Council consideration	26
SECTION II	27
The Constitution and the scope of judicial review	27
Separation of powers.....	27
The distinction between merits and judicial review	27
Other constitutional limits on the scope of judicial review?.....	29
PART III - OTHER FACTORS RELEVANT TO THE SCOPE OF JUDICIAL REVIEW	31
INTRODUCTION	31
Reasons for limiting judicial review	31

SECTION I.....	32
The judicial perspective	32
Justiciability	32
Legislative decisions	35
Polycentric decisions	36
Deference.....	38
SECTION II	41
The executive perspective	41
Considerations raised in the context of the Council’s first report.....	42
Other considerations in seeking to limit judicial review	44
SECTION III.....	47
The public perspective	47
PART IV - THE GROUNDS OF REVIEW AND THE SCOPE OF JUDICIAL REVIEW	50
Introduction	50
SECTION I.....	50
The grounds of review	50
Review of facts.....	51
Review of process.....	52
SECTION II	53
A closer look at certain grounds of review	53
Unreasonableness	53
Relevant/irrelevant considerations.....	56
Error of law	58
Jurisdictional error	59
Procedural fairness (including probative evidence)	61
PART V - PROPOSED CONSIDERATIONS IN DEVELOPING A GUIDE TO THE SCOPE OF JUDICIAL REVIEW.....	69
SECTION I.....	70
Proposed considerations	70
SECTION II	71
Consistency/predicability.....	71
A case study	71
The migration experience	73
Abuse of review process.....	75
Previous Council consideration.....	77
Resource-related issues.....	79
The executive perspective.....	79
The judicial perspective	81
Previous Council consideration.....	83
Contributing factors and responses.....	83
SECTION III.....	86
The nature of the decision	86
Policy and policy decisions.....	86

Decisions related to the administration of justice	95
Decisions where there are ongoing relationships.....	101
Legislative decisions	102
Decisions made in urgent or emergency contexts.....	108
SECTION IV.....	110
Nature of the decision-maker	110
Status of the decision-maker	110
Expert decision-makers	113
Outside contractors.....	114
Government business enterprises.....	117
Decisions by certain other government bodies.....	123
SECTION V	124
Other.....	124
No impact upon final decision.....	124
No injustice	125
PART VI - THE EXISTENCE OF ADEQUATE ALTERNATIVE REMEDIES	127
.....	
Introduction	127
SECTION I.....	128
Two perspectives	128
The executive perspective.....	128
The judicial perspective	130
SECTION II	131
What is an adequate alternative remedy.....	131
Nature of the review right	131
Adequate alternative remedy - two case studies	137
SECTION III.....	138
The grounds of review	138
Error of law	138
Procedural fairness	138
Unreasonableness/irrelevant considerations etc	139
SECTION IV.....	140
Merits review	140
The judicial perspective	140
The executive perspective.....	141
Previous Council consideration.....	143
Concluding comments	146
PART VII - HOW MIGHT JUDICIAL REVIEW APPROPRIATELY BE LIMITED.....	148
Introduction	148
SECTION I.....	148
The underlying constitutional framework.....	148
The uncertain effect of privative clauses	149
General principles relating to legislative removal of rights	150

Removal of rights and judicial review.....	152
SECTION II	154
The need for clarity and specificity	154
The need for clarity	154
The need for specificity	155
APPENDIX 1	157
ADMINISTRATIVE DECISIONS (JUDICIAL REVIEW) ACT 1977	157
APPENDIX 2	160
LEGISLATIVE LIMITATIONS ON REVIEW	160
Other ways in which judicial review may be limited	162
APPENDIX 3	168
ALTERNATIVE REMEDIES.....	168
Two case studies	168
Taxation	168
The review scheme.....	168
Significance of the review scheme from the executive perspective	169
Significance of the review scheme from the perspective of the taxpayer	169
Workplace Relations Appeal scheme	170
The scheme.....	170
Support for the scheme	171

SCOPE OF JUDICIAL REVIEW DISCUSSION PAPER EXECUTIVE SUMMARY

The purpose of the discussion paper is to explore the desirable balance between the right of an individual to test the legality of administrative action by way of judicial review and the need to ensure that as a result of the exercise of this right, the work of government is not unreasonably frustrated.

Structure of discussion paper

The discussion paper consists of seven Parts and three Appendices. At key points throughout the paper, discussion points are positioned (see further below). At these points, views on matters under consideration are sought.

PART I of the discussion paper is introductory, dealing with the objectives and timing of the project. It defines judicial review in the Australian context, with particular reference to the common law and the *Administrative Decisions (Judicial Review) Act 1977*. Legislative limitations on judicial review and the Council's previous involvement in considering the scope of judicial review are also canvassed.

PART II focuses on the constitutional significance of judicial review (to the rule of law, accountability and the protection of individual rights). It also addresses constitutional considerations relevant to the scope of judicial review (including the separation of powers doctrine, the distinction between merits and judicial review and the extent to which parliament may limit the scope of judicial review of administrative decisions).

PART III addresses judicial review from three different perspectives including:

- the judicial perspective - justiciability (including legislative and polycentric decisions) and deference
- the executive perspective - considerations raised in the context of the Council's first report, *Administrative Decisions (Judicial Review) Act 1977, Exclusions Under Section 19, - 1978* and other more recently expressed considerations; and
- the public perspective - including speed, cost and accessibility.

PART IV explores the grounds of review including an analysis of judicial review of facts and process. It then investigates specific grounds of judicial review including:

- unreasonableness
- relevant and irrelevant considerations

- error of law, jurisdictional error; and
- procedural fairness.

Consideration is also given to both the executive and the judicial perspectives on procedural fairness.

PART V identifies a number of suggested considerations which should be taken into account in developing the Council's proposed guide to the scope of judicial review. Comment is sought on the adequacy and completeness of these considerations.

PART VI focuses on the impact upon the scope of judicial review of adequate alternative remedies.

The Part canvasses the executive and judicial perspectives on this topic (with reference to case-law); the issue of what constitutes an adequate alternative remedy; the impact upon 'adequacy' of applications for review on particular grounds of review; and the adequacy of merits review having regard to all these factors.

PART VII addresses the means of limiting or excluding judicial review. In doing this, the paper refers to:

- the underlying constitutional framework
- the uncertain effect of privative clauses
- general principles relating to the legislative removal of rights
- removal of rights and judicial review; and
- the need for clarity and specificity.

APPENDIX I sets out Schedule 1 to the *Administrative Decisions (Judicial Review) Act 1977*.

APPENDIX 2 sets out examples of legislative clauses to be found in Commonwealth legislation imposing limitations on judicial review.

APPENDIX 3 provides details of the review schemes for administrative decisions developed in relation to income tax assessment and workplace relations.

Discussion points

Discussion point 1

Are there ways in which judicial review has been limited by way of legislative provision other than to those referred to in the discussion paper? (page 16)

Discussion point 2

Are there factors additional to justiciability, the legislative/administrative nature of a decision, polycentricity and deference which are relevant when seeking to define the desirable scope of judicial review? (page 40)

Discussion point 3

Are there factors (for instance, resource considerations, decisions involving policy, existence of adequate alternative remedies) other than those referred to in the discussion paper that are relevant to the government perspective in seeking to define the desirable scope of judicial review? (page 45)

Discussion point 4

Are there factors relevant to the public perspective in seeking to define the desirable scope of judicial review other than those referred to in the discussion paper? (page 48)

Discussion point 5

Is the nature of any ground of review in itself sufficient to justify the limitation or exclusion of judicial review? (page 66)

Discussion point 6

Are there matters associated with the grounds of judicial review which are relevant to the determination of the appropriate scope of judicial review other than those set out in the discussion paper? (page 66)

Discussion point 7

Are there considerations that need to be taken into account in seeking to define the appropriate scope of judicial review other than to those referred to in the discussion paper? (page 70)

Discussion point 8

Is the need for consistency/predicability in decision-making outcomes a sufficient reason for seeking to limit or exclude judicial review? (page 73)

Discussion point 9

Is 'abuse' of the review process a reason for limiting access to judicial review? Does such abuse exist? Can it be better identified by the courts or

administrators? How best is it addressed – judicially or legislatively? (page 77)

Discussion point 10

What is the significance of the volume/cost of cases in seeking to limit or exclude judicial review? Are there other factors, such as poor primary-decision-making, a reluctance on the part of the courts to refuse review where there are other adequate alternative review mechanisms, or the ready availability of legal aid, which contribute to the high volume of cases and which should be first addressed? (page 82)

Discussion point 11

Are there circumstances in which judicial review should be limited/excluded on the basis of the policy nature of a decision? Is justiciability a factor in making this determination? Is the executive, or are the courts, better placed to determine when review should be limited on this basis? Are particular grounds of review more susceptible to exclusion on the basis of the policy content of a decision than others? (page 92)

Discussion point 12

Where alternative remedies exist in the criminal justice system, are there circumstances in which judicial review should nonetheless be permitted? (page 99)

Discussion point 13

Is the existence of an ongoing relationship (an employment relationship for instance) a reason for limiting judicial review on some grounds? If yes, which grounds? (page 100)

Discussion point 14

In seeking to impose limitations on decisions of a legislative nature, where those decisions are of wide import, is this better done by the courts or by way of legislation? (page 106)

Discussion point 15

Should there be limitations on judicial review in urgent or emergency situations? Are such limitations better imposed by the courts or Parliament? (page 107)

Discussion point 16

What impact, if any, should the status of a decision-maker have on the desirable scope of judicial review? (page 110)

Discussion point 17

What impact, if any, should the expertise of a decision-maker have on the desirable scope of judicial review? Are there any grounds of review more susceptible to limitation/exclusion on this basis than others? (page 112)

Discussion point 18

How should decision-making by outside contractors be regulated? (page 114)

Discussion point 19

How should decision-making by government business enterprises be regulated? (page 120)

Discussion point 20

How should decision-making by other government bodies be regulated? (page 122)

Discussion point 21

Is it appropriate for the legislature to seek to limit judicial review in circumstances where there is no impact on the final decision and no injustice? (page 124)

Discussion point 22

Are the courts sufficiently pro-active in refusing to allow judicial review in the face of alternative remedies? (page 130)

Discussion point 23

Are there factors relevant to the circumstances in which remedies will present adequate alternatives to judicial review other than those referred to in the discussion paper ? (page 135)

Discussion point 24

Are there particular features of the tax and workplace relations review regimes that reduce the importance of access to judicial review?

Are there other regimes in which, in excluding or limiting judicial review, reliance is placed on alternative remedies to judicial review? (page 136)

Discussion point 25

Do you agree with the assessment in the discussion paper of the impact of particular grounds of judicial review in determining the existence or otherwise of adequate alternative remedies? (page 138)

Discussion point 26

In what circumstances, if any, should the availability of full merits review be sufficient to displace an application for judicial review? (page 143)

Discussion point 27

Do you agree with the concluding comments in the discussion paper in relation to alternative remedies? Are there any other relevant considerations? (page 145)

Discussion point 28

Do you agree that legislative clarity and specificity are important elements in seeking to limit judicial review? Are there other relevant factors? (page 153)

PART I - INTRODUCTION

SECTION I

The Council

The project

Timing of the project

SECTION II

What is judicial review?

Further aspects of judicial review

*Judicial review at common law and under the Administrative Decisions
(Judicial Review) Act 1977
Grounds of review*

SECTION III

Limits on the scope of judicial review

*Judicial limits
Legislative limits - the AD(JR) Act
Other ways in which judicial review has been legislatively limited
Legislative schemes with comprehensive alternative review schemes
Non-legislative means of limiting judicial review – privatisation/outsourcing*

SECTION IV

Previous Council involvement in consideration of the scope of judicial review

SECTION I

The Council

1.1 The Administrative Review Council was established under the *Administrative Appeals Tribunal Act 1975* as an integral part of the Commonwealth system of administrative law. The Council advises the

Attorney-General on a broad range of administrative law issues related to Commonwealth administration.

The project

1.2 In November 2000 the Administrative Review Council approved a project to explore the proper scope of judicial review having regard to the need to achieve an appropriate balance between providing individuals with a means of testing the legality of administrative action and preventing litigation from frustrating government policies.

1.3 The intention of this discussion paper is to encourage debate and invite comments and submissions on relevant issues, with a view to allowing the Council to develop a set of principles to assist determination of the circumstances in which judicial review, or various grounds of review, should (or should not) apply. It is anticipated that the ultimate outcome of the project will be the publication of a set of guidelines for agencies, legislators and commentators, exploring policy issues relevant to the scope of judicial review, including the desirable minimum scope of judicial review having regard to constitutional considerations.

1.4 In July 1999 the Administrative Review Council published a booklet entitled *What Decisions Should Be Subject to Merits Review?* That publication contained non-binding guidelines designed to assist in the development of legislative proposals involving administrative decision-making powers. The Council hopes that its final publication on the scope of judicial review will be a useful complement to its merits review booklet.

Timing of the project

1.5 In view of the Council's close involvement, historically, with the scope of judicial review for the purposes of the *Administrative Decisions (Judicial Review) Act 1977* (the AD(JR) Act), and having regard to other subsequent significant developments in the history of Australian judicial review, the Council considers it both timely and helpful to revisit the scope of judicial review.

1.6 As a consequence of the increasing use of review mechanisms, other than the AD(JR) Act, the scope of any such consideration must necessarily extend beyond the scope of judicial review for the purposes of that Act.

1.7 The Council hopes that this discussion paper will make a significant contribution to the debate in this area. It also hopes that the ultimate production of guidelines will assist stakeholders to identify the circumstances in which, and the area of our Constitutional system by which, the exclusion of judicial review is appropriate.

SECTION II

What is judicial review?

1.8 A classic statement of the scope and nature of judicial review is to be found in the judgment of Brennan J in *Attorney-General (NSW) v Quin*:

The essential warrant for judicial intervention is the declaration and enforcing of the law affecting the extent and exercise of power: that is the characteristic duty of the judicature as the third branch of government... The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error.¹

1.9 Judicial review is not the re-hearing of the merits of a particular case. Rather, it is where a court reviews a decision to make sure that the decision-maker used the correct legal reasoning or followed the correct legal procedures.

1.10 On review, if a court finds that a decision has been made unlawfully, the powers of the court will generally be confined to setting the decision aside and remitting the matter to the decision-maker for reconsideration according to law.² It follows from this that there will be circumstances in which although a decision is not the correct or preferable decision on the facts, it will not be open to judicial review. Conversely, there may be situations where a decision is the correct or preferable one, but may be set aside because it is subject to legal error.

1.11 Judicial review is a more limited right than a right of appeal. As noted by Mason J (as he then was) in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*:

The limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind. It is not the function of the court to substitute its own decision for that of the administrator by exercising a discretion, which the legislator has vested in the administrator. Its role is to set limits on the exercise of that discretion, and a decision made within those boundaries cannot be impugned.³

¹ (1990) 170 CLR 1, 35 - 36.

² *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559, 578-579, 598-600.

³ (1986) 162 CLR 24, 40-41 citing *Wednesbury Corporation* [1948] 1 KB, 228.

1.12 Whereas merits review is available in relation to decisions specified under the *Administrative Appeals Tribunal Act 1975*, judicial review is available for all decisions of an administrative character.

Further aspects of judicial review

Judicial review at common law and under the Administrative Decisions (Judicial Review) Act 1977

1.13 Judicial review remedies existed in Australia prior to the introduction of the *Administrative Decisions (Judicial Review) Act 1977* (the AD(JR) Act) and have coexisted with that Act since its introduction. The traditional common law means of challenging the validity of administrative action is by way of the prerogative writs of prohibition, certiorari and mandamus or the equitable remedies of injunction or declaration.

1.14 Additionally, there are actions for damages for misfeasance in public office, for recovery of moneys exacted *colore officii* or paid by mistake⁴ and for trespass, detinue and conversion where the plaintiff challenges the validity of the authority relied upon by the defendant as an answer to the allegedly tortious acts. Remedies in contract and negligence may also be available.

1.15 Jurisdiction under the AD(JR) Act is conferred on the Federal Court, and review under that Act may be considered to be that court's principal judicial review jurisdiction. However, applications for review are not as significant as appeals under the *Administrative Appeals Tribunal Act 1975* or other legislation permitting appeals as to the merits of the decision.

1.16 Further jurisdictional bases for judicial review in Australia include:

- section 75(iii) of the Constitution which confers upon the High Court original jurisdiction 'in all matters...in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party'
- the High Court's power under section 75(v) of the Constitution to issue the remedies of mandamus, prohibition, or injunction against an officer of the Commonwealth⁵

⁴ See for instance Beasley J, *Aerolineas Argentinas & Ors v Federal Airports Corporation* (1995) 63 FCR 100.

⁵ Described by the High Court in *Re Refugee Tribunal; Ex parte Ala* (2000- 2001) 204 CLR 82, [20] per Gaudron and Gummow JJ. The Court has indicated on a number of occasions that certiorari is not available in the exercise of its jurisdiction under section 75(v) 'except as ancillary to the Court's jurisdiction and power to grant one or more of the remedies there mentioned': per Kirby J in *Re McBain; Ex parte Australian Catholic Bishops Conference; Re McBain; Ex parte Attorney-General* (2002) ALJR 694, [176].

- section 39B(1) of the *Judiciary Act 1903* which confers the High Court's Constitutional writ jurisdiction, as described above, on the Federal Court, and section 39B(1A)(c) which has given the court jurisdiction in relation to any matter 'arising under the laws of the Parliament, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter'; and
- section 44 of the *Judiciary Act* which permits the High Court to remit matters to the Federal Court. Matters which may be remitted include those in which mandamus or prohibition is sought against a Commonwealth officer or in which a person is being sued or suing on behalf of the Commonwealth is a party.

1.17 At the time of the passage of the AD(JR) Act the expectation was that review of administrative decisions under that Act would become the predominant form of review in Australia. As a result of limitations on review by the Federal Court under the AD(JR) Act⁶ however, review by way of section 75(v) of the Constitution and section 39B of the *Judiciary Act* continues to represent significant alternatives to AD(JR) Act review.

1.18 While some decisions are excluded from review under the AD(JR) Act, the Federal Court can nonetheless deal with such matters by virtue of the jurisdiction bestowed on it by the *Judiciary Act*. The High Court also has original jurisdiction in relation to such matters. Although noting these jurisdictional interfaces, it is not the Council's intention, in developing the discussion paper, to focus upon them.

Grounds of review

1.19 While it has been said that the grounds of judicial review 'defy precise definition',⁷ most if not all are concerned either with the processes by which a decision was made or the scope of the power of the decision-maker. As noted, results or outcomes of the decision-making process are not primary concerns of judicial review.

1.20 Although the common law grounds are reflected in large part in the grounds of review set out in sections of the AD(JR) Act,⁸ there are some differences. For example, under the AD(JR) Act, the common law distinction between errors of law on and off the record has been abolished. There is also

⁶ Including as a result of the limitations imposed on review by Schedule 1 of the AD(JR) Act itself.

⁷ M Aronson, B Dyer, *Judicial Review of Administrative Action*, 2000, p 72.

⁸ The AD(JR) Act was the result of the recommendations made by the Commonwealth Administrative Review Committee, 'Report August 1971', *Parliamentary Paper No 144*, 1971 (the Kerr Committee report); supported by the Prerogative Writ Procedures, 'Report of Committee of Review', *Parliamentary Paper No 56*, 1973 (the Ellicott Committee report), and was enacted with a view to rationalising the common law grounds of review and providing a simpler procedure.

the 'catch all' ground of 'otherwise contrary to law'⁹ and the 'no evidence' ground, which is different from considering whether a decision-maker has wrongfully included or excluded evidence or included irrelevant evidence.¹⁰

1.21 Common law judicial review covers some areas of administration not covered by the AD(JR) Act, such as decisions not made under an enactment.

1.22 For the purposes of this discussion paper, the Council will take account of the following grounds of judicial review.¹¹ While the grounds are not mutually exclusive, they provide a framework for discussion:

- Failure to observe natural justice including:
 - the right to be heard
 - the rule against actual and apprehended bias; and
 - the probative evidence rule;¹²
- Decisions which are not authorised, including:¹³
 - no substantive power/failure to comply with procedure;
 - abuse of power including:
 - bad faith¹⁴
 - power not exercised for purpose given¹⁵
 - unreasonableness including duty to inquire;¹⁶ and
 - taking into account irrelevant considerations in the exercise of a discretion or failing to take account of relevant considerations;
 - failure to exercise discretion, including:
 - acting under dictation;¹⁷

⁹ See sections 5(1)(j) and 6(1)(j) of the AD(JR) Act.

¹⁰ Sections 5(1)(h) and 6(1)(h) of the AD(JR) Act.

¹¹ A number of these grounds of review are examined in greater detail in Part III(I), of the discussion paper.

¹² A decision may be held to be invalid on this ground on the basis that there is no evidence to support the decision or that no reasonable person could have reached the decision on the available facts i.e. there is insufficient evidence to justify the decision taken.

¹³ The doctrine of *ultra vires* may be narrow or extended. The first form is that a public authority may not act beyond its statutory power: the second covers abuse of power and defects in its exercise.

¹⁴ An exercise of discretionary power in bad faith is where the power has been exercised for an ulterior purpose, that is, for a purpose other than a purpose for which the power was conferred.

¹⁵ Where the power is not exercised for the purpose for which it has been given. The purpose of the discretion may be determined from the terms and subject matter of the legislation or the scope of the instrument conferring it.

¹⁶ Where a decision is so unreasonable that no reasonable person could ever have arrived at it.

¹⁷ Where an official exercises a discretionary power on direction or at the behest of some other person or body. An official may have regard to government policy but must apply their mind to the question and the decision must be their decision.

- Excess of jurisdiction, including:
 - error of law¹⁸/jurisdictional error;¹⁹ and
 - fraud.²⁰

SECTION III

Limits on the scope of judicial review

1.23 The nature of our constitutional system is such that the scope of judicial review of executive decision-making is a topic guaranteed to occupy the minds of courts and government.

1.24 It appears always to have been recognised (by both the courts and the executive) that some areas of administrative decision-making are more or less amenable to judicial review than others. There are many important areas of government decision-making where attempts have been made to limit the scope of judicial review.

Judicial limits

1.25 Areas where the courts have shown themselves unwilling to intervene include acts of a high governmental or political nature, such as the signing of a treaty, the existence of war, belligerence and neutrality and the recognition of foreign governments. Traditionally also, decisions within the industrial relations area, and more recently, many decisions on personnel matters within public administration, and with respect to income tax assessment have been considered by the courts to be less amenable to judicial review.

Legislative limits - the AD(JR) Act

1.26 The exceptions to judicial review set out in Schedule 1 the AD(JR) Act²¹ represent the largest single legislative consolidation of exemptions from judicial review. They were the subject of consideration in a number of Council publications, notably, the Council's first report, *Administrative Decisions (Judicial Review) Act 1997, Exclusions under Section 19 - 1978*.

1.27 Another example of a legislative limitation on judicial review is provided by the *Migration Reform Act 1992*, which replaced the Federal

¹⁸ In arriving at their decision, a decision-maker must not misinterpret the legislation under which they are acting or in any way indicate a misunderstanding of the law. Like *ultra vires* therefore, this ground involves persons or bodies acting beyond their lawful authority. Historically though, the term was applied to non-judicial bodies exercising legislative or administrative powers, whereas jurisdictional error was used in relation to inferior courts or tribunals exercising judicial or quasi-judicial powers.

¹⁹ Under this ground, a decision-maker must have legal authority to deal with the matter upon which they propose to make a decision.

²⁰ In most cases, the sort of fraud which occurs is the falsification or suppression of evidence.

²¹ A copy of Schedule 1 to the AD(JR) Act is included at Appendix I to the discussion paper.

Court's jurisdiction in relation to migration matters under the AD(JR) Act and section 39B of the Judiciary Act.

1.28 From the date of that legislation, the Migration Act contained its own statement of the permissible grounds of review by the Federal Court. These grounds were more limited than those provided for under the AD(JR) Act or at common law.²²

1.29 While the Federal Court's power under section 44 of the Judiciary Act to hear cases on remittal from the High Court remained, in reviewing such cases, the Federal Court was limited to the powers it would have had if the case had been commenced in the Federal Court.

Other ways in which judicial review has been legislatively limited

1.30 Government has not been content to limit judicial review under the AD(JR) Act alone. Other broader means of limiting review, notably, by way of privative clause, directed at common law review, have also been used.

Privative clauses

1.31 Typically, a privative clause provides that a decision should not be challenged, appealed against, quashed or called into question, or be subject to prohibition, mandamus or injunction in any court or on any account whatever.²³ A clause prescribing time limits beyond which there can be no judicial review may also be regarded as a privative clause.²⁴

1.32 On its face, such a clause would appear to be unconstitutional in so far as it seeks to deprive the High Court of its jurisdiction to require officers of the Commonwealth to act within the law. Parliament may enact laws within the limits of its legislative capacity which must be conformed with, and 'create, and define, the duty, or the power, or the jurisdiction, and determine the content of the law to be obeyed',²⁵ though it 'cannot deprive the High Court 'of its constitutional jurisdiction to enforce the law so enacted'.²⁶

²² In *Abebe v Commonwealth* (1999) 197 CLR 510 the High Court upheld the power of Parliament to do this.

²³ Regulation 17 of the *National Security (Coal Mining Industry Employment) Regulations 1941 (Cth)*. This regulation was the subject of consideration in *R v Hickman; ex parte Fox and Clinton* (1945) 70 CLR 598.

²⁴ Provided they are reasonable, such limits have been ruled valid by the courts. See for instance *Yong Jun Quin v Minister for Immigration and Multicultural Affairs* (1997) 144 ALR 695 and *Hong v Minister for Immigration and Multicultural Affairs* (1998) 82 FCR 468. See also the judgment of Callinan J in *S157/2002 v Commonwealth of Australia* [2003] HCA 2, [164 - 176] in relation to section 486A of the *Migration Act 1985* which imposes a time limit of 35 days within which to bring proceedings under s section 75(v) of the Constitution in the High Court.

²⁵ See *S157/2002 v Commonwealth of Australia* [2003] HCA 2, [5] per Gleeson CJ.

²⁶ *Id.*

1.33 Traditionally, such clauses (also known as *Hickman* clauses)²⁷ have been construed by the courts so as to allow review on three apparently narrow grounds - that the decision was not made bona fide, that it did not relate to the subject matter of the relevant statute and that it was not reasonably referable to the power of the decision-maker.

1.34 This rule of construction is a means of reconciling provisions in an Act which impose requirements on a decision-maker to follow set statutory criteria when making a decision with provisions which purport to oust the jurisdiction of the courts to review whether those criteria were complied with.

1.35 As stated by Dixon J in *Hickman's* case:

... where the legislature confers authority subject to limitations, and at the same time enacts such a clause...it becomes a question of interpretation of the whole legislative instrument whether transgression of the limits, so long as done bona fide and bearing on its face every appearance of an attempt to pursue the power, necessarily spells invalidity'.²⁸

1.36 At the time of the passage of the AD(JR) Act, eight privative clauses existed under federal legislation.²⁹ While all were repealed by section 4 of that Act, four of the categories of decision covered by the clauses³⁰ were subsequently included in Schedule 1 to the Act. The Act did not seek to preclude future use of privative clauses.

1.37 Privative clauses have achieved public prominence recently as a result of the inclusion of such a clause in the Migration Act by the *Migration (Judicial Review) Act 2001*. By means of this clause, appearing in section 474 of the Migration Act, it has been sought to limit the types of review applications that can be made, not only to the Federal Court as formerly, but also to the High Court.

²⁷ *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598. The case related to the validity or otherwise of regulation 17 of the *National Security (Coal Mining Industry Employment) Regulations* (1941 No. 25-1944 No. 48), which provided that decisions in relation to the settlement of industrial disputes by Local Reference Boards could not be 'challenged, appealed against, quashed or called into question, or be subject to prohibition, mandamus or injunction in any court whatever'.

²⁸ *Ibid*, 616 per Dixon J. See also *Deputy Commissioner of Taxation of the Commonwealth of Australia v Richard Walter Pty Limited* (1995) 183 CLR 168.

²⁹ *Coal Industry Act 1946*, section 44; *Conciliation and Arbitration Act 1904*, section 60; *Courts Martials Appeals Act 1955*, section 30; *Customs Act 1901*, section 119; *Navigation Act 1935*, section 325; *Re-establishment and Employment Act 1945*, section 28; *Public Service Arbitration Act 1920*, section 20; *Stevedoring Industry Act 1956*, section 22.

³⁰ *Coal Industry Act 1946*, section 44; *Conciliation and Arbitration Act 1904*, section 60; *Courts Martials Appeals Act 1955*, section 30; *Customs Act 1901*, section 119.

1.38 Although the validity if not the effectiveness,³¹ of such clauses has been largely upheld in cases subsequent to *Hickman*,³² the Council believes that rather than using privative clauses and relying on the courts to maintain their jurisdiction by reading them down, consistent with accepted interpretive principles, it would be more appropriate to set out with precision the boundaries of decision-making power so that a person's rights and obligations are apparent on the face of the legislation.

1.39 Such an approach would also be more in keeping with underlying concepts of government accountability and transparency. This issue will be returned to in more detail in the Part VII to the discussion paper.

Other limits

1.40 Other ways in which judicial review may in practical terms be limited by way of legislative provision include:

1. by giving a decision-making body very wide jurisdiction
2. by providing that a provision is not intended to affect the validity of a determination³³
3. by providing that anything that the body shall have effect as if enacted by parliament
4. by including evidentiary clauses deeming all things done and, that a certain result has been achieved on production of a certificate, or other formal proof of proper form
5. by way of self-executing decision, that is, a decision where the 'decision' follows automatically from the existence of objective facts³⁴
6. by providing in legislation that only certain decisions are reviewable, thereby excluding others, which may then only be challenged at common law on limited grounds
7. by amending the range and scope of the grounds of review themselves; and
8. by making certain aspects of the decision-making process legislative rather than administrative in character.

1.41 Examples of clauses falling within these categories are set out in Appendix 2 to the discussion paper.

³¹ See for instance *Darling Casino Ltd v New South Wales Casino Control Authority* (1997) 191 CLR 559; *Hockey v Yelland* (1984) 157 CLR 124.³² See particularly the decision of the High Court in *S157/2002 v Commonwealth* [2003] HCA 2.

³³ In *Project Blue Sky v Australian Broadcasting Authority* (1998) CLR 355, [93] per McHugh, Gummow, Kirby and Hane JJ said that rather than seeking to make a distinction between mandatory and directory provisions, the better approach was 'to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid'.

³⁴ See *Goldie v Commonwealth of Australia* (2002) 188 ALR 708 involving consideration of section 189 of the *Migration Act 1958*.

Discussion point 1

Are there other ways in which judicial review has been limited legislatively?

Please elaborate.

Legislative schemes with comprehensive alternative review schemes

1.42 As well as exclusion by way of legislative provision, some legislative review schemes, as a whole, have the effect of limiting or discouraging merits and judicial review. The schemes of review developed under the *Workplace Relations Act 1996*, the *Migration Act 1958* and the *Income Tax Assessment Act 1936* are significant examples of this. The comprehensive review process established under the *Public Service Act 1999*, with its layered review process and its emphasis upon alternative conciliatory methods of dispute settlement is also relevant.

Non-legislative means of limiting review - privatisation/outsourcing

1.43 A significant development from the judicial review perspective has been the government policy of privatisation and outsourcing, reflected in the increase in recent years of contracting out of government services and in the corporatisation of government business enterprises.

1.44 While utilised in areas such as electricity and gas supply, garbage collection and street maintenance, contracting out and corporatisation also extend into areas that have traditionally been seen as the responsibility of government such as social and health services, aged care, housing, public transport and employment assistance.³⁵

1.45 Although standards are often imposed on contractors under such schemes, responsibility for enforcing standards lies with the contracting agencies as opposed to service users,³⁶ who do not have direct rights of recourse against providers.

1.46 Such developments have the potential effectively to remove a wide range of government decisions and public functions from the scope of administrative review,³⁷ and in some cases, from the scrutiny of parliament.³⁸

³⁵ See generally Administrative Review Council, *The Contracting Out of Government Services*, Report No 42, 1998.

³⁶ For instance, under the *Aged Care Act 1997* (Pt 4.4), the Secretary of the Department may impose sanctions on an 'approved provider' for not complying with the Principles prescribed under the Act.

³⁷ As a result of categorising certain activities of such bodies as 'commercial in confidence' the accountability of such bodies may be further limited.

³⁸ See for instance Robin Creyke, 'Sunset for the Administrative Law Industry: Reflections on

SECTION IV

Previous Council involvement in consideration of the scope of judicial review

1.47 Prior to the commencement of the AD(JR) Act, the Council was requested by the Government of the day to advise on the question of exclusions from the application of that Act.

Report No 1, 1978

1.48 In its first report, *Administrative Decisions (Judicial Review) Act 1977 – Exclusions Under Section 19 – 1978*, the Council canvassed a range of arguments for and against the exclusion of various sorts of decisions from review under the AD(JR) Act. These included:

- the number of decisions likely to be brought for review
- decisions including high level policy
- decisions where adequate alternative avenues of review exist
- decisions by public authorities in competition with private enterprise
- employment decisions other than those relating to conciliation and arbitration; and
- decisions relating to conciliation and arbitration.

Report No 9, 1980

1.49 Subsequently, in its 9th report, *Administrative Decisions (Judicial Review) Amendment Bill 1980*, the Council commented on the *Administrative Decisions (Judicial Review) Amendment Bill 1980* which inserted Schedules 1 and 2 into the AD(JR) Act. In its report, the Council noted that a number of decisions included in the Schedules appeared to be inconsistent with the bases of the Council's previous recommendations based on the previous form of the Act.³⁹

Report No 26, 1986

1.50 In its 26th report, *Review of the Administrative Decisions (Judicial Review) Act 1977 – Stage One*, the Council produced a preliminary report, in which it considered whether experience of the operation of the AD(JR) Act had:

...demonstrated, that in the course of achieving its primary aims, the Act ha[d] left public authorities open to unwarranted litigation.⁴⁰

Developments under a Coalition Government', in John McMillan (ed) *Administrative Law under the Coalition Government*, Australian Institute of Administrative Law, 1997, 20. See also Administrative Review Council, *The Contracting Out of Government Services*, Report No 42, 1998.

³⁹ Administrative Review Council, *Administrative Decisions (Judicial Review) Amendment Bill 1980*, Report No 9, 1980, paragraph 9.

⁴⁰ Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act 1977 – Stage One*, Report No 26, 1986, paragraph 6.

1.51 The Council observed that:

It would be highly undesirable if the Act were being used unduly to frustrate or impede legitimate administrative action in an attempt to obtain mere tactical advantage.⁴¹

1.52 Following an analysis of the areas in which it had been alleged that there had been abuses of the Act,⁴² although finding that there had been no such abuses, the Council identified two areas of difficulty:

- possible use of the Act for delaying purposes; and
- problems of overlapping remedies both in general terms and in terms of legislation which provides specific avenues for review or appeal against administrative action.

1.53 The Council considered four options for reform:

- inserting a leave requirement in the AD(JR) Act
- extending and clarifying the Federal Court's power to refuse an application for review
- restricting review of interlocutory decisions; and
- excluding particular classes of decisions from AD(JR) Act review.⁴³

1.54 Apart from decisions taken in the course of committal proceedings involving Commonwealth officers,⁴⁴ the Council did not support exclusion from review of particular classes of decisions in relation to which concerns about abuse of the Act had been expressed.

1.55 Relevantly however, the Council recommended that the Federal Court should have a discretion to stay or refuse to grant an application for review, amongst other things:

...where the Federal Court is satisfied that adequate provision is made by any law (other than the AD(JR) Act) under which the application is entitled to seek review by the Federal Court, by another court or by another tribunal, authority or person, of that decision, conduct or

⁴¹ Ibid, paragraph 9.

⁴² There was concern about abuse of the AD(JR) Act in eight areas of commonwealth administration: broadcasting, trade practices, migration, taxation, customs, committal proceedings, prosecution decisions and extradition proceedings.

⁴³ Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act 1977 – Stage One Report*, Report No 26, 1986, paragraph 48.

⁴⁴ Ibid, paragraph 96, on condition that State jurisdiction to review such decisions was revived.

failure, and that, in all the circumstances of the case, it would be reasonable, or would have been reasonable to seek that review.⁴⁵

1.56 The Council recommended that the discretion should be capable of exercise at any stage of the proceedings and should be exercised at the outset of proceedings wherever appropriate.⁴⁶

Report No 32, 1989

1.57 In its 32nd report, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act*, having regard to the inclusion in the Judiciary Act of section 39B, the Council recommended widening the scope of judicial review under the AD(JR) Act commensurate with that available under section 75 of the Constitution by way of the Constitutional writs.

1.58 In the report, the Council recommended the repeal of many of the paragraphs of Schedule 1 and the extension of the powers of the Federal Court to refuse to grant applications for review, especially where the applicant had an alternative remedy available and where the decision sought to be challenged was not justiciable. The Council noted that:

To the extent that, in some areas of the Commonwealth administration, there exists side by side with rights under the AD(JR) Act a right of appeal, or to make other application to the courts...the operation of the AD(JR) Act as one fork of a bifurcated review path needs to be considered.⁴⁷

1.59 In considering this issue, the Council recommended strengthening the Court's discretion to refuse relief in circumstances where alternative relief was available.⁴⁸ This recommendation was said to be underpinned by the objective of:

...eliminat[ing], as far as possible, the need for litigants to consider dual avenues of review in the Federal Court which, again, detract from the simplicity, equity and efficiency of the law and the legal process.⁴⁹

⁴⁵ Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act 1977 - Stage 1*, Report No 26, 3.

⁴⁶ *Ibid*, paragraphs 47, 92. On the strength of the recommendations made by the Council in its 26th report, the government introduced amending legislation into the Parliament. The Bill, the *Administrative Decisions (Amendment) Bill 1986/8*, went further than had been recommended by the Council, by requiring the Federal Court to refuse applications under the AD(JR) Act where the applicant had an alternative right to seek review unless the applicant satisfied the Court that the interests of justice required that it should not refuse to grant the application.

⁴⁷ Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act*, Report No 32, 1989, paragraph 447.

⁴⁸ *Ibid*, see Recommendation 15.

⁴⁹ *Ibid*, paragraph 218.

1.60 In its 32nd report, the Council also considered the question of judicial review under the AD(JR) Act of decisions of officers of the Commonwealth under non-statutory schemes, recommending that the Act should be extended to include a decision of an administrative character made, or proposed to be made by an officer under a non-statutory scheme or program, the funds for which were authorised by a government appropriation.⁵⁰

1.61 The Council also briefly examined the issue of the application of the AD(JR) Act to commercial decisions of government business enterprises (GBEs) that were not statutory authorities, concluding that review of decisions of GBEs should continue to be available under the Act, but that commercial decisions of GBEs not created by statute but incorporated under companies legislation were subject to sufficient control under corporations law.⁵¹

Report No 38, 1995

1.62 In its 38th report, *Government Business Enterprises and Commonwealth Administrative Law*, the Council concluded that, as a general principle, 'the commercial activities of a GBE, undertaken in a market where there is real competition, should be exempt from the administrative law package'.⁵² The Council also noted however, that activities of a GBE that were not commercial activities conducted in a commercial market, should continue to be subject to administrative law.⁵³ The Council again recommended extension of the scope of the AD(JR) Act to make it commensurate to that of section 75 of the Constitution.

1.63 In its 42nd report, *The Contracting Out of Government Services*, the Council considered the application of administrative law in the context of services contracted out to extra-governmental bodies. It concluded that the contracting out of government services should not result in a diminution of government accountability or the ability of members of the public to seek

⁵⁰ Ibid, see Recommendation 1. In its 42nd report, *The Contracting Out of Government Services*, the Council repeated this Recommendation; see Administrative Review Council, *The Contracting Out of Government Services*, Report No 42, 1998, Recommendation 22.

⁵¹ Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act*, Report No 32, 1989, paragraphs 430-438.

⁵² Ibid, paragraph 421.

⁵³ Ibid, paragraph 424.

redress where affected by the actions of a contractor delivering a government service.⁵⁴

⁵⁴ Administrative Review Council, *The Contracting Out of Government Services*, Report No. 42, 1998, p vii.

PART II - THE SIGNIFICANCE AND CONSTITUTIONAL SCOPE OF JUDICIAL REVIEW

SECTION I

The significance of judicial review

An element of the rule of law
An aid to accountability
Consistency and precedent
An individual right
Previous Council consideration

SECTION II

The Constitution and the scope of judicial review

Separation of powers
The distinction between merits and judicial review
Other constitutional limits on the scope of judicial review?

SECTION I

The significance of judicial review

2.1 In Australia, judicial review represents an important element in a comprehensive administrative justice system.¹ Other elements of this system include:

- internal administrative review by superior officers
- external administrative review by tribunals
- external scrutiny and recommendations by Ombudsmen and Parliamentary Commissioners²
- access to information under freedom of information legislation or statutory requirements for the provision of documents
- protection of information under privacy legislation
- statutory rights to reasons; and
- protection against breaches of human rights or discriminatory conduct by human rights and anti-discrimination legislation

¹ A system more comprehensively and specifically directed than the system of entrenched civil rights of the United States, the Canadian *Charter of Rights and Freedoms* or the United Kingdom's *Human Rights Act 1998*.

² It might be noted that the Government has recently considered establishing an office of Inspector-General of Taxation to strengthen the advice given to the government on matters of tax administration and process. The intention is that the Inspector-General will act as an advocate for all taxpayers. Complaints for individual taxpayers would continue to be investigated by the Ombudsman.

2.2 Associated accountability mechanisms include:

- parliamentary processes and committee systems; and
- the role of Commonwealth and State auditor-generals in addressing systemic issues.

2.3 Within this scheme, judicial review has a number of important functions.

An element of the rule of law

2.4 As well as defining the constitutional limits of judicial review, the Constitution underscores the significance of judicial review as an element of the rule of law:

Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by the law and the interests of the individual are protected accordingly.³

2.5 As also noted:

Those exercising executive and administrative powers are as much subject to the law as those who are or may be affected by the exercise of those powers. It follows that, within the limits of their jurisdiction and consistent with their obligation to act judicially, the courts should provide whatever remedies are available and appropriate to ensure that those possessed of executive and administrative powers exercise them only in accordance with the laws which govern their exercise. The rule of law requires no less.⁴

2.6 Further:

To the extent that the courts are impeded from exercising judicial review of administrative decisions, the rule of law is negated.⁵

An aid to accountability

2.7 It has been said that leaving aside considerations flowing from the role of the courts in determining the content and application of the rule of law,

³ *Church of Scientology v Woodward* (1982) 154 CLR 25, 71 per Brennan J.

⁴ *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 157 per Gaudron J.

⁵ The Hon Sir Gerald Brennan, 'The Mechanics of Responsibility in Government' (1999) 58(3) *Australian Journal of Public Administration* 3, 9.

‘the most obvious benefit brought by judicial review is that it forces care in administrators and reviewers in their adjudicative process’.⁶ Further:

...one by-product of judicial review as an accountability measure is that it can encourage independence and integrity. A decision-maker whose ruling is subject to curial oversight is less likely to toe a particular policy line or succumb to political pressure to decide cases in a particular way. The courts offer security to those who make a bona fide attempt to make findings on the facts and the law as presented and sanctions for those who choose to act on arbitrary or capricious considerations.⁷

Consistency and precedent

2.8 One of the important aspects of the jurisdiction of tribunals in our administrative system is that they do not establish precedent: each case is to be examined on its merits. In contrast, although the decision to litigate can be quite *ad hoc*, the rulings of the courts are of precedential value and can provide direction on important elements of administrative law, especially obligations imposed upon decision-makers by particular statutes.

2.9 As noted by the Law Council of Australia in the context of its submission on the *Migration (Judicial Review) Bill 1998*:

The Refugee Review Tribunal...deals with complex legal issues...The courts provide interpretation of legislative provisions and on the relationship between old and new laws. Both the Refugee Review Tribunal and the Immigration Review Tribunal, like most tribunals, often see differences of opinion arise between the way particular members interpret the relevant legislation...court decisions are normative and binding on tribunal members. The fostering of consistency between members and the knowledge of the correct interpretation of a certain provision are benefits for all those involved in the immigration process, from applicants, departmental decision-makers through to review officers.⁸

An individual right

2.10 Government is the source of many benefits, and an individual’s right to review of decisions in relation to the administration of those benefits is as important as the entitlement to bring an action in the courts to enforce a right against a fellow citizen.⁹

⁶ Mary Crock, ‘Privative Clauses and the Rule of Law: The Place of Judicial Review Within the Construct of Australian Democracy’, in S Kneebone (ed) *Administrative Law and the Rule of Law: Still Part of the Same Package?*, Australian Institute of Administrative Law, 1999, 57, 80.

⁷ Id.

⁸ Submission of the Law Council of Australia to the Senate Legal and Constitutional Legislation Committee Inquiry into the *Migration Legislation Amendment Bill (No 2) 1998*, *Migration (Visa Application) Charge Amendment Bill 1998* and *Migration (Judicial Review) Bill 1998*, Submission No 5, 18 January 1998, 12.

⁹ Former Chief Justice of Australia, Sir Anthony Mason AC KBE, ‘The Importance of Administrative

2.11 Such a right is not adequately protected by the doctrine of ministerial responsibility.¹⁰ That is reflected in the comprehensive Australian system of administrative law.

2.12 In summary:

...judicial review plays an important part, in a highly public way, of declaring, reasserting and supporting important standards necessary to the rule of law expressed in the delivery of administrative justice as well as addressing departures from those standards in individual cases.¹¹

Previous Council consideration

2.13 Consistent with these views, in its Report No 32, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act*, the Council noted that:

Judicial review of administrative decisions is an aspect of the rule of law which requires that executive action is not unfettered or absolute but is subject to legal constraints. The availability of judicial scrutiny of the legality of administrative action serves the twofold purpose of protecting individual rights and interests from unauthorised action and ensuring that public powers are exercised within their legal limits.¹²

2.14 More recently, in its submission to the Senate Legal and Constitutional Legislation Committee on the *Migration (Judicial Review) Bill 1998*, the Council observed that:

In the Commonwealth context, it is...of fundamental constitutional importance that a decision made or action taken in the exercise of authority, whatever its source, is susceptible to review by the courts, if the decision-maker or action taker is an officer of the Commonwealth or a person acting for or on behalf of the Commonwealth or Commonwealth authority and if the decision or action affects a right, privilege, duty, obligation or legitimate expectation of a person.¹³

2.15 Additionally, the Council sees a role for judicial review in:

Action as a Safeguard of Individual Rights' (December 1994) 1(1) *Australian Journal of Human Rights* 3.

¹⁰ *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170, 222 per Mason CJ.

¹¹ Justice R S French, 'Judicial Review Rights' (March 2001) 28 *AIAL Forum* 30, 32.

¹² Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act*, Report No 32, 1989, paragraph 19.

¹³ Submission of the Administrative Review Council to the Senate Legal and Constitutional Legislation Committee Inquiry into the *Migration Legislation Amendment Bill (No 2) 1998*, *Migration (Visa Application) Charge Amendment Bill 1998* and *Migration (Judicial Review) Bill 1998*, Submission No 4, 18 January 1998, at 5.

...enhanc[ing] community confidence about the standards that will generally be applied by the Commonwealth administration in making decisions which affect the interests of individuals in the community. An essential part of judicial review of administrative action has been the progressive development by an independent judiciary of procedural standards of fairness and lawfulness against which the powers of government officials may be measured.¹⁴

2.16 The Council maintains these views, and considers that, without good reason, the scope of judicial review should not be limited:

Ousting of judicial review is not a matter to be undertaken lightly by the Parliament...It is the cause for the utmost caution when one arm of government (in this case the Executive) seeks the approval of the second arm of government (the Parliament) to exclude the third arm of government (the Judiciary) from its legitimate role whatever the alleged efficiency, expediency or integrity of the programs is put forward in justification.¹⁵

SECTION II

The Constitution and the scope of judicial review

Separation of powers

2.17 As recognised some thirty years ago by the Commonwealth Administrative Review Committee (the Kerr Committee), the shape of our federal system of administrative law is very much the consequence of the regime established by Parts I, II and III of the Constitution, particularly the concept of the separation of powers.¹⁶ Constitutional considerations define not only the significance of judicial review, but also its limits.

2.18 A very important consequence of the separation of powers for the federal administrative review system is that whereas in the review of administrative decisions, the courts can exercise the judicial power of the Commonwealth, administrative tribunals cannot.

The distinction between merits and judicial review

2.19 The judicial review powers vested in the courts are complementary to but distinct from the administrative review powers vested in Commonwealth merits review tribunals. Even though in making decisions, a merits review

¹⁴ Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act*, Report No 32, 1989, 6.

¹⁵ Senate Legal and Constitutional Legislation Committee, *Consideration of Legislation Referred to the Committee: Migration Legislation Amendment (Judicial Review) Bill 1998*, April 1999, 27 citing the Scrutiny of Bills Committee report quoted in *Submission No. 8*, National Council of Churches in Australia, 3.

¹⁶ The Kerr Committee report, 1971, see particularly Chapter 4, paragraphs 59 - 73.

tribunal may be required to form opinions on questions of law, some of which may be complex and untested by the courts, ultimately, the determination of such questions is an exercise of federal judicial power and must be made by the courts. In reaching their determinations, the courts are not required to have regard to the interpretation placed on the law by tribunals.

2.20 The difference between merits and judicial review is commonly stated in terms of merits review enabling the review of all aspects of a decision including findings as to facts and the exercise of any discretions that may have been conferred on the decision-maker, whereas judicial review is concerned only with whether or not the decision was lawfully made.

2.21 A merits review body will 'stand in the shoes' of the primary decision-maker and will make a fresh decision based on all the information available to it.¹⁷ Whereas the object of merits review is to ensure that 'the correct or preferable' decision is made on the material before the decision-maker,¹⁸ judicial review is directed towards ensuring that the decision made by the primary decision-maker was properly made within the legal limits of the relevant power.

2.22 In response to the constitutional divide between judicial and executive power, the courts have shown themselves concerned, on many occasions, to acknowledge and to maintain the margins between judicial and merits review.

2.23 As noted by Brennan J in *Quin's* case:

If the courts were to assume a jurisdiction to review administrative acts or decisions which are unfair in the opinion of the court - not the product of procedural unfairness, but unfair on the merits - the courts would be assuming a jurisdiction to do the very thing which is to be done by the repository of an administrative power, namely, choosing among the courses of action upon which reasonable minds might differ...If judicial review were to trespass on the exercise of administrative power, it would put its own legitimacy at risk.¹⁹

2.24 Similar views were subsequently expressed by four High Court judges in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* where it was also noted that:

...the reasons of an administrative decision-maker are meant to inform and not to be scrutinised upon [by] over-zealous judicial review by

¹⁷ Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report No 39, 1995, paragraphs 2.2 - 2.3, 2.54 - 2.55, and for example, powers conferred on the Administrative Appeals Tribunal by subsection 43(1) of the *Administrative Appeals Tribunal Act 1974*.

¹⁸ *Re Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60, 68.

¹⁹ *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 37-38 per Brennan J.

seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed.²⁰

2.25 In a separate judgment in *Wu Shan Liang's* case, Kirby J said that a decision-maker's reasons 'must be considered fairly' and that:

It is erroneous to adopt a narrow approach, combing through the words of the decision-maker with a fine appellate tooth comb, against the prospect that a verbal slip will be found warranting the inference of an error of law.²¹

2.26 Furthermore, it has been said that:

The process of administrative decision-making is often quite different from the syllogistic process of judicial decision-making. In the first place, judicial decision-making usually has only two basic elements: law and fact ... If the discretion or evaluation plays a part, the part is well confined. No broad policy elements intrude. But policy is often an integral part of administrative decision-making, denying the application of the syllogistic method. A decision-maker who has mistaken a fact or made an error in law may nevertheless make the correct or preferable decision if he legitimately applies a policy wide enough to require the same decision whether or not there be a mistake or an error of law. Some administrative action is not based upon the existence of a fact but on the apprehension of the possibility that the fact exists.²²

Other constitutional limits on the scope of judicial review?

2.27 From a constitutional perspective, beyond the issue of the dichotomy between judicial and legislative power, the Commonwealth Parliament has considerable power to limit persons obtaining remedies prohibiting or enforcing administrative action.

2.28 Consistent with this view, it has been said that:

The proper balance between merits and judicial review is ultimately a matter of legislative policy, subject of course to any constitutional restrictions on the complete removal of judicial review. It is for the government to determine whether to have any merits review of administrative decisions, and if so, the appropriate number of levels or tiers of merits review (whether internal or external). Within constitutional limits, it is also open for the government to find ways to limit the availability and scope of judicial review avenues, so as to place more emphasis on a merits review process.²³

²⁰ (1996) 185 CLR 259, 272 per Brennan CJ, Toohey, McHugh and Gummow JJ.

²¹ *Ibid*, 291.

²² Justice Brennan, 'The Purpose and Scope of Judicial Review' (1986) 2 *Australian Bar Review* 93, 95.

²³ David Bennett QC, Commonwealth Solicitor-General, 'Balancing Judicial Review and Merits Review' (September 2002) 53 *Admin Review* 22.

2.29 Such limitations are of course subject to the 'well recognised principle that the subject's right of recourse to the court is not to be taken away except by clear words'.²⁴

2.30 As said by Gleeson CJ in *S157/2002 v Commonwealth of Australia*:

Section 75(v) of the Constitution confers upon this Court, as part of its original jurisdiction, jurisdiction in all matters in which a writ of mandamus, or prohibition, or an injunction, is sought against an officer of the Commonwealth. It secures a basic element of the rule of law. The jurisdiction of the Court to require officers of the Commonwealth to act within the law cannot be taken away by Parliament. Within the limits of its legislative capacity, which are themselves set by the Constitution, Parliament may enact the law to which officers of the Commonwealth must conform. If the law imposes a duty, mandamus may issue to compel performance of that duty. If the law confers power or jurisdiction, prohibition may issue to prevent excess of power or jurisdiction. An injunction may issue to restrain unlawful behaviour. Parliament may create, and define, the duty, or the power, or the jurisdiction, and determine the content of the law to be obeyed. But it cannot deprive this Court of its constitutional jurisdiction to enforce the law so enacted.²⁵

²⁴ *Hockey v Yelland* (1984) 157 CLR 124, 130 per Gibbs CJ.

²⁵ [2003] HCA 2, [5].

PART III - OTHER FACTORS RELEVANT TO THE SCOPE OF JUDICIAL REVIEW

INTRODUCTION

Reasons for limiting judicial review

SECTION I

The judicial perspective

Justiciability
Legislative decisions
Polycentric decisions
Deference

SECTION II

The executive perspective

Considerations in the context of the Council's first report
Other considerations in seeking to limit judicial review

SECTION III

The public perspective

INTRODUCTION

Reasons for limiting judicial review

3.1 Policy considerations relevant to the scope of judicial review are generally not neatly set out anywhere. Nor are they necessarily always apparent through a process of logical deduction. For instance, where the impact of an administrative decision upon the freedom of an individual might be considered to be an important consideration in determining whether or not there should be a right of judicial review, the 'end focus' of judicial review is not upon merits outcomes.

3.2 As noted earlier in the discussion paper, in reviewing administrative action, the court's task does not extend past identifying and enforcing the law determinative of the limits and governing the exercise of the decision-maker's power.

3.3 It has been remarked by Brennan J in the case of *Attorney-General (NSW) v Quin* that:

If, in so doing, the court avoids administrative injustice or error, so be it: but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.

The consequence is that the scope of judicial review must be defined not in terms of the protection of individual interests, but in terms of the extent of the power and the legality of its exercise.¹

3.4 So it is that in the criminal, extradition and migration areas for instance, all of them involving decisions concerning personal liberty, the application of judicial review has been subject to statutory limitation.

3.5 As reflected in earlier discussion, it appears to be accepted by all elements involved in Australia's administrative law system (the executive, the legislature and the judiciary), that in some circumstances, subject to constitutional limitations, there should be limits on the scope of judicial review.

3.6 In seeking to identify the relevant policy considerations underlying this view, the Council will be looking at a range of materials, including what has been said by courts and individual judges, administrators and commentators (including the Council) in relation to the scope of judicial review under the AD(JR) Act, other legislative regimes and at common law. In so doing, however, it is not possible to dispense entirely with Constitutional considerations discussed in Part II of the discussion paper.

SECTION I

The judicial perspective

3.7 There are at least four important areas in which the courts have imposed limitations upon the scope of their own powers in response to the Constitutional boundaries to judicial review. These limitations are often articulated in terms of related, though less constitutionally directed considerations, and represent a valuable tool in determining the desirable scope of judicial review.

Justiciability

3.8 Nowadays, justiciability may best be categorised as a concept whose purpose is to confine the courts to the exercise of judicial power in relation to

¹ (1990) 170 CLR 1, 36.

issues not properly assignable to other branches of government under the separation of powers doctrine and otherwise 'within the institutional competence' of the courts.² Conversely, non-justiciability is a term that may conveniently be used to denote decisions where the court is of the view that 'the decision-making function lies within the province of the executive and that it is inappropriate that the courts should trespass into that preserve'.³

3.9 Historically, there is a range of decisions in which the courts have long indicated a reluctance to intervene. Such decisions may be traced back to the seventeenth century and the rules relating to the immunity of the Crown from judicial review and for protecting the 'unbounded discretion' of the King's prerogatives.⁴

3.10 Recent developments in the concept of justiciability have coincided with the diminution of the prerogative powers,⁵ and a corresponding expansion of the range of executive powers exercised by officials. There has been a related recognition that the doctrine of Crown immunity has less force in relation to executive action. This is reflected in *R v Toohy: ex parte Northern Land Council*, where it was noted that an exercise of statutory discretionary power by the Queen's representative 'very often affects the right of the citizen'⁶ and:

...there may be a duty to exercise the discretion one way or another; the discretion may be precisely limited in scope; it may be conferred for a specific or an ascertainable purpose; and it will be exercisable by reference to criteria or considerations express or implied.⁷

3.11 In the wake of *Toohy* it has been said that:

...[the] function associated with Crown immunity [has been] banished from administrative law. The assumption that questions of justiciability could be answered on the basis of simple distinctions between statutory

² The Hon Sir Anthony Mason AC KBE, 'The High Court as Gatekeeper' (2000) 24(2) *Melbourne University Law Review* 784, 788 and 'The Importance of Judicial Review of Administrative Action as a Safeguard of Individual Rights' (December 1994) 1(1) *Australian Journal of Human Rights* 3, 8.

³ The Hon Sir Anthony Mason AC KBE, 'The Importance of Judicial Review of Administrative Action as a Safeguard of Individual Rights' *An Address to the Australian Bar Association Fifth Biennial Conference*, 4 July 1994, 14.

⁴ *R v Toohy ; Ex parte Northern Land Council* (1981) 151 CLR 170, 218 per Mason J quoting from W Blackstone, *Commentaries on the Laws of England* (1809) Bk 1, p 251. See also Margaret Allars, 'The Rights of Citizens and the Limits of Administrative Decisions: The Contribution of Sir Anthony Mason to Administrative Law' (2000) 28(2) *Federal Law Review* 187.

⁵ The prerogative powers include, *inter alia*, the power to conduct foreign affairs, to declare war or peace, to enter into international treaties, to prorogue, dissolve and summon the parliament, to appoint Commonwealth officers (Commonwealth Constitution, section 64) and a priority to debts.

⁶ (1981) 151 CLR 170, 219.

⁷ *Id.*

powers and prerogative powers, or between the status of the Queens' representative and that of a minister, [has been] exploded.⁸

3.12 Nonetheless, it is suggested that the concept of justiciability remains an important element of our administrative law system.

3.13 In determining whether or not a decision is justiciable, the nature and effect of the decision have emerged as critical factors. Two elements are involved:

- whether the decision has consequences which affect some person or body other than the decision-maker by either:
 - altering legal rights or obligations enforceable by or against a person; or
 - depriving a person of some benefits which they had in the past and which they can legitimately expect to continue or where an assurance has been given by the decision-maker that the right will not be withdrawn, or depriving a person of some benefit or advantage or body other than the decision-maker; and
- whether there are special features of the decision which make judicial review inappropriate⁹ such as issues of high level policy, polycentricity,¹⁰ and decisions of a legislative nature (discussed above).

3.14 The foundation for justiciability was discussed by Kirby J:

Th[e] foundation [of justiciability] lies in the separation of powers required by the Constitution. Is the question tendered, of its nature, such as is apt to a court performing court-like functions? If it is not, it matters little in practical terms whether the court, facing an objection, rules that it lacks jurisdiction for want of a "matter" engaging its powers, or that it says that any such "matter" would be non-justiciable. In either event, the court's duty is plain. It should stop the proceedings forthwith. It will thereby send the parties to the other branches of government, or to other public fora, in which they can make their complaint.¹¹

⁸ Margaret Allars, 'The Rights of Citizens and the Limits of Administrative Decisions: the Contribution of Sir Anthony Mason to Administrative Law' (2000) 28(2) *Federal Law Review* 187, 196.

⁹ See Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374, 408-9. See also Wilcox J in *Minister for Arts, Heritage and the Environment v Peko Wallsend* (1987) 75 ALR 218, 305 and *Kioa v West* (1985) 159 CLR 550, 583 per Mason J.

¹⁰ That is, disputes requiring account to be taken of a large number of interlocking and interacting interests and considerations. See, for example, Lon Fuller, 'The Forms and Limits of Adjudication' (1979) 92 *Harvard Law Review* 353.

¹¹ *Thorpe v Commonwealth of Australia (No 3)* 144 ALR 677, 692.

3.15 With reference to these considerations, although some decisions are no longer immune from judicial review on the basis of prerogative, they are still treated with caution by the courts. Decisions affecting national security, foreign affairs, decisions to prosecute or not to prosecute and the grant of pardons to convicted persons are amongst such decisions. However, it is not sufficient to seek to identify cases that are non-justiciable on the basis of subject matter alone.¹²

3.16 The grant of executive power under the constitution necessarily entails the imposition of enforceable limitations on the exercise of that power.¹³ Although non-justiciability may exclude certain aspects of judicial review, it may not exclude others. Some aspects of decisions relating to international relations, national security and even politics, may be justiciable.¹⁴ Irrespective of subject matter, decisions will be subject to judicial review if they are illegal or *ultra vires*.¹⁵

3.17 Regard may also be had to the nature of the decision under review, including the way it is arrived at, rather than the general subject area. In one case for example, where a decision to remove someone's positive security vetting due to sexual preference was based on national security considerations and was not reviewable on substantive grounds, it was held that the decision was reviewable for breach of procedural fairness.¹⁶

3.18 At its broadest, justiciability has been said to cover matters such as 'the availability of alternative and more convenient remedies, political questions, questions concerning the distribution of scarce resources and future rights'.¹⁷

3.19 Justiciability in the broad sense is what a significant portion of this discussion paper is about.

Legislative decisions

3.20 In Part II of the discussion paper, 'The significance and constitutional scope of judicial review', broad constitutional limits on the exercise of judicial review have been canvassed. Arising from one of these limitations, the doctrine of the separation of powers, is the accepted categorisation of government functions as legislative, administrative and judicial.

¹² Sir Anthony Mason AC KBE, 'The Scope of Judicial Review', Lecture 2, *National Lecture Series on Administrative Law* (November 2001) *AIAL Forum* No 31 21, 24.

¹³ *Re Ditfort; ex parte Deputy Commissioner of Taxation (NSW)* (1998) 19 FCR 347, 369.

¹⁴ Peter Cane, 'Merits Review and Judicial Review: The AAT as Trojan Horse' (2000) 28 *Federal Law Review* 213, 216 - 7.

¹⁵ Sir Anthony Mason, 'The Importance of Judicial Review of Administrative Action as a Safeguard of Individual Rights' (December 1994) 1(1) *Australian Journal of Human Rights* 3, 8.

¹⁶ *R v Director of Government Communications Headquarters; Ex Parte Hodges* [1988] COD 123.

¹⁷ Peter Cane, 'The Function of Standing Rules in Administrative Law' (1980) *Public Law* 303, 312.

3.21 Although decisions are rarely held to be invalid on the basis of these distinctions, apart from those reflecting an exercise of judicial power, the legislative or administrative character of a decision has been an aspect which both the courts and government have taken into account in determining which has pre-eminence.

3.22 The distinction is highlighted in the AD(JR) Act, which is limited in its application to 'administrative decisions'.¹⁸ However, it has lost much of its significance as a result of the inclusion in the Judiciary Act of section 39B(1A)(c), which confers jurisdiction on the Federal Court in matters 'arising under any law made by Parliament'.¹⁹

3.23 Recent case-law seeks to address the issue of whether or not a decision is 'legislative' in terms of whether or not the rights of particular individuals are affected. In *Kioa v West* for instance, three of the majority judges emphasised the need for persons to be affected 'as individuals' if natural justice is to apply.²⁰

3.24 This topic is explored in more detail in Section III of Part V of the discussion paper, 'Nature of the decision'.

Polycentric decisions

3.25 It has been said that:

The notion of legal polycentricity...is best understood as referring to matters which are marked by the numerous, complex and intertwined nature of the issues, of the repercussions, and of the interests and people affected. For example, any decision requiring the allocation of economic resources is significantly polycentric, as every competing claim on government resources is a relevant factor.²¹

3.26 A polycentric decision may therefore be a decision involving complex policy issues relating to the economic, political and social consequences of a proposed mining project, as occurred in *Minister for Arts, Heritage and Environment v Peko Wallsend*.²² A result is that the case may not be appropriate for judicial review.

3.27 A polycentric decision may also be one where the limited nature of available government funding will constantly mean that the government will

¹⁸ See the definition of 'decision' in sub-section 3(1) of the *Administrative Decisions (Judicial Review) Act 1997*.

¹⁹ For further discussion see Australian Law Reform Commission Report 92, October 2001, *The Judicial Power of the Commonwealth, A Review of the Judiciary Act 1903 and Related Legislation*, 136.

²⁰ *Kioa v West* (1985) 159 CLR 550, 584 per Mason J, 619 - 21 per Brennan J and 632 per Deane J.

²¹ Jeremy Kirk, 'Rights, Review and Reasons for Restraint' (March 2001) 23(1) *Sydney Law Review* 19, 26.

²² (1987) 75 ALR 218.

have to balance its priorities. There is authority for the view that the courts may intervene in such circumstances where an allocation of resources is beyond power or 'capricious and irrational such that no reasonable person could have devised it': however, the courts should not intervene to devise a fairer method of allocation.²³

3.28 Case law indicates that the courts will retreat from review that will have an impact on the allocation of resources. As noted by one British judge:

I would stress the absolute undesirability of the court making an order which may have the effect of compelling a doctor or health authority to make available scarce resources (both human and material) to a particular child, without knowing whether or not there are other patients to whom those resources might more advantageously be devoted.²⁴

3.29 On one view, polycentric disputes are inappropriate for judicial resolution on the basis that not all affected parties may be identifiable or able to be brought before the court and that there may be too many possible permutations of results for the parties and judges to be able to provide reasons for the making of a decision.²⁵ However, it has also been observed that:

All judicial decisions are polycentric to the extent that they have precedential value and those decisions cover interests and matters not directly before the court.²⁶

3.30 It is noted²⁷ that the Canadian Supreme Court is willing to permit the intervention of affected parties,²⁸ whilst the US Supreme Court has long permitted written submissions from interested parties as *amici curiae*.²⁹ In Australian cases such as *Project Blue Sky Inc v Australian Broadcasting Authority*³⁰ involving a challenge to the validity of Australian Broadcasting Authority standards regulations, a tendency in this regard is noted, although whether it will crystallise remains uncertain.³¹

²³ *Minister for Primary Industries v Austral Fishing* (1993) 112 ALR 211, 221 and 230 per Beaumont and Hill JJ.

²⁴ *Re J (A Minor) (Medical Treatment)* [1992] 4 All ER 614, 625 per Leggat J.

²⁵ Lon Fuller, 'The Forms and Limits of Adjudication' (1979) 92 *Harvard Law Review* 353, 394-5 and 402-3.

²⁶ Jeremy Kirk, 'Rights, Review and Reasons for Restraint' (March 2001) 23(1) *Sydney Law Review* 19, 26.
²⁷ *Id.*

²⁸ FL Morton and I Brodie, 'The Use of Extrinsic Evidence in Charter Litigation before the Supreme Court of Canada' (1993) 3 *National Journal of Constitutional Law* 1, 10.

²⁹ US Supreme Court Rules, Rule 37.

³⁰ (1998) 194 CLR 355.

³¹ See *Attorney-General v Breckler* (1999) 197 CLR 83. The judgments in *Re McBain; Ex parte Australian Catholic Bishops Conference; Re McBain; Ex parte Attorney-General* (2002) 76 ALJR 694 would suggest not.

3.31 It has been said that:

...neither polycentricity in particular, nor capability in general, is a valid *per se* objection to judicial review of constitutional rights. However, they may be factors supporting judicial restraint in particular cases, and they may require extensions of traditional procedures relating to evidence and the representation of wider interests.³²

3.32 Although unlikely to be reviewable generally, such decisions would nonetheless be reviewable for *ultra vires*. Further, it has been observed with reference to the *Tampa* case³³ that 'the courts must be satisfied that a matter is non-justiciable before they decline to deal with the matter'.³⁴

3.33 In that case, it was noted that:

It is not an interference with the exercise of executive power to determine whether it exists in relation to the subject matter to which it is applied and whether what is done is within its scope. Even in the United Kingdom, unencumbered by a written constitution, the threshold question whether an act is done under prerogative power is justiciable.³⁵

Deference

3.34 The role of the courts with respect to judicial review may be limited if there is a principle of deference applied.

3.35 The focus of deference in Australia is primarily upon findings of fact and verbal slips in statements of reasons and is to be contrasted with the focus of the United States *Chevron* doctrine³⁶ and to an extent, the Canadian public interest standard,³⁷ on agency interpretation of legislation. Contrary to the position in those two countries, in *Corporation of the City of Enfield v*

³² Jeremy Kirk, 'Rights, Review and Reasons for Restraint' (March 2001) 23(1) *Sydney Law Review* 19, 27-28.

³³ *Ruddock v Vadarlis* (2001) 183 ALR 1.

³⁴ Sir Anthony Mason AC KBE, 'The Scope of Judicial Review', Lecture 2, National Lecture Series on Administrative Law (November 2001) *AIAL Forum* No 31 21, 26.

³⁵ *Ruddock v Vardalis* (2001) 183 ALR 1, [30] per Black CJ and French J.

³⁶ The *Chevron* doctrine applies in the United States where the statute administered by a federal agency or regulatory authority is susceptible of several constructions, each of which may be seen to be a reasonable representation of Congressional intent. As noted by Gleeson CJ, Gummow, Kirby and Hayne JJ in *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 151 'It is a matter of debate in the US whether the doctrine applies to the interpretation by agencies of statutes which define their jurisdiction'.

³⁷ This arises from a general requirement in Canada that administrative agencies take into account public interest in their decision-making. There is also another deference doctrine in Canada arising from the decision of the Supreme Court of Canada in *New Brunswick Liquor Corp v CUPE Local 963* ((1979) SCR 227) restricting courts' ability to review administrators' interpretation of their statutory charter, including jurisdictional facts, unless the decision was patently unreasonable. See further, Robin Creyke, 'The Criteria and Standards for Merits Review by Administrative Tribunals', *Commonwealth Tribunals: The Ambit of Review, Law and Policy Papers, Paper No 9*, Centre for International and Public Law, 1, pp 15-16.

Development Assessment Commission, the High Court has emphasised that the approach is not:

...the product of any doctrine of 'deference', but of basic principles of administrative law respecting the exercise of discretionary powers.³⁸

3.36 In support of this view, the Court adverted to the distinction between the merits and the legality of administrative action, and to comments of Brennan J in *Waterford v Commonwealth*³⁹ to the effect that 'there is no error of law simply in making a wrong finding of fact.'

3.37 However, where the legality of executive administrative action taken pursuant to a decision depends on the existence of a particular fact or factual situation, and the question is whether the tribunal acted within jurisdiction, their Honours held that the court must make its own independent determination. This obligation would arise notwithstanding the fact that the court might attach greater weight to the decision of a primary decision-maker with particular knowledge of an industry or otherwise specially equipped to make the decision.⁴⁰

3.38 The Court acknowledged however that while it must come to its own answer on the question of jurisdiction, if in so doing it were in doubt as to any factual matter, it would be open to it 'to resolve that doubt by giving weight to any determination upon it by the primary decision-maker.'⁴¹

3.39 The doctrine is also relevant to certain decisions made within jurisdiction. In *Enfield*,⁴² the High Court has said that where questions arise, within the jurisdiction of an administrative tribunal, upon a settled construction of the applicable legislation and where little might be gained from a detailed examination of previous decisions, in a proceeding in the original jurisdiction of a court on "appeal" from that tribunal, the 'court should attach great weight to the opinion of the [tribunal]'.⁴³

3.40 Reference is made to a case⁴⁴ where the court said that it 'should attach great weight to the opinion of the tribunal' in considering whether a proposed trade mark was distinctive and ought to have been registered.⁴⁴ The Court

³⁸ Ibid, 153, per Gleeson CJ, Gummow, Kirby and Hayne JJ. See also judgment by Gaudron J in the same case.

³⁹ (1978) 71 ALR 673.

⁴⁰ (2000) 199 CLR 135, 155.

⁴¹ (2000) 199 CLR 135, 151, per Gleeson CJ, Gummow, Kirby and Hayne JJ. See also the judgment of Gaudron J 158-159.

⁴² Ibid, 154, per Gleeson CJ, Gummow, Kirby and Hayne JJ.

⁴³ Id.

⁴⁴ *Registrar of Trademarks v Muller* (1980) 144 CLR 37, 41.

also noted⁴⁵ approval by Dixon CJ, Williams and Kitto JJ in another case⁴⁶ of a passage from a judgment of Lloyd-Jacob J stating that:

By reason of his familiarity with trade usages in this country, a familiarity which stems not only from an examination of marks applied for and of the many trade journals which he sees, but from the perusal and consideration of trade declarations and the hearing of applications or oppositions, the Registrar is peculiarly well fitted to assess the standards by which the trade and public must be expected to estimate the uniqueness of particular indications of trade origin.⁴⁷

3.41 As noted by Gleeson CJ, Gummow, Kirby and Hayne JJ,⁴⁸ the weight to be given to the opinion of the tribunal in each case will depend on the circumstances. According to their Honours, such matters as the field in which the tribunal operates, criteria for appointment of its members, the materials on which it acts in exercising its functions and the extent to which decisions are supported by disclosed processes of reasoning, would be relevant considerations.

3.42 Where the question is whether the tribunal acted within jurisdiction, the court must make its own independent determination, although it may attach greater weight to the decision of a primary decision-maker with particular knowledge of an industry or otherwise specially equipped to make the decision.⁴⁹

3.43 This approach may also influence the shape of the obligations to be assumed by decision-makers in relation to the grounds of review, notably, procedural fairness. In *Minister for Immigration and Ethnic Affairs v Jia* for example, Hayne J said as follows:

The procedures for decision-making by that body [the Refugee Review Tribunal] are much less formal than those of a court. There is no provision for any contradictor and the procedures are, therefore, not adversarial. The decision-maker has little security of tenure and, at least to that extent, may be thought to have some real stake in the outcome. The decision-maker, in a body like the Refugee Review Tribunal, will bring to the task of deciding an individual's application a great deal of information and ideas which have been accumulated or formed in the course of deciding other applications. A body like the Refugee Review Tribunal, unlike a court, is expected to build up "expertise" in matters such as country information. Often information of that kind is critical in

⁴⁵ *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 154 per Gleeson CJ, Gummow, Kirby and Hayne JJ.

⁴⁶ In *Eclipse Sleep Products Inc v The Registrar of Trade Marks* (1957) 99 CLR 300, 321-2.

⁴⁷ In *the Matter of Ford-Werke AG's Applications for a Trade Mark* (1955) 72 RPC 191, 194.

⁴⁸ *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 154-155.

⁴⁹ *Ibid*, 155.

deciding the fate of an individual's application, but it is not suggested that to take it into account amounts to a want of procedural fairness by reason of prejudice.

The analogy with curial processes becomes even less apposite as the nature of the decision-making process, and the identity of the decision-maker, diverges further from the judicial paradigm. It is trite to say that the content of the rules of procedural fairness must be "appropriate and adapted to the circumstances of the particular case". What is appropriate when a decision of a disputed question is committed to a tribunal whose statutorily defined processes have some or all of the features of a court will differ from what is appropriate when the decision is committed to an investigating body. Ministerial decision-making is different again.⁵⁰

Discussion point 2

3.44 These cases suggest a degree of deference to the inherent knowledge or expertise of the original decision-maker or tribunal on the part of the court. This inherent knowledge or expertise may also be relevant to the shape of the obligations of the decision-maker on issues of procedural fairness.

3.45 However, it is another thing altogether to suggest that that the expertise or inherent knowledge of the decision-maker (or the tribunal) is such as to form the basis for excluding judicial review; the adversarial process has the capacity to allow supplementation of the technical inadequacies of the courts.

Are there other factors relevant to the judicial perspective in seeking to define the desirable scope of judicial review?

Please elaborate.

SECTION II

The executive perspective

3.46 The most comprehensive indication of the executive view of the desirable scope of judicial review (at least for the purposes of the AD(JR) Act), occurred in the late 1970s when, at the request of the government, exclusions from the application of that Act sought by agencies were under consideration by the Council.

⁵⁰ (2001) 205 CLR 507, [180 - 181].

Considerations raised in the context of the Council's first report

3.47 The Council's first report, *Administrative Decisions (Judicial Review) Act 1977: Exclusions under Section 19, - 1978*, sets out a range of arguments for and against the exclusion of various sorts of decisions from review under the AD(JR) Act.

3.48 In the report, the Council rejected arguments by government agencies for the exclusion of judicial review on the basis of the following considerations:

- the high number of decisions likely to be brought forward for review⁵¹
- decisions involving large elements of policy⁵²
- the existence of adequate alternative remedies⁵³
- the urgency of the decision⁵⁴
- that the decision was made by an inter-governmental authority⁵⁵
- that the powers were exercised by State officials⁵⁶
- that the decision was made by a consultative or an advisory authority or authority not dealing directly with the public⁵⁷
- in general, that the Act would be used to frustrate and delay the administrative process
- that the decision was a general management determination under the Public Service Act (such as decisions as to age limits, appropriate qualifications and the creation, abolition and classification of positions)⁵⁸
- decisions in the Public Service employment area (including decisions relating to recruitment and appointment, discipline, re-integration and appointment of First Division and Statutory officers) other than promotions and promotion appeals which were recommended for exclusion for 12 months from the date of commencement of the AD(JR) Act⁵⁹
- the difficulty in producing reasons⁶⁰
- the possibility of parliamentary disallowance⁶¹

⁵¹ Administrative Review Council, *Administrative Decisions (Judicial Review) Act 1977: Exclusions under Section 19*, Report No. 1, 1977, paragraph 49.

⁵² *Ibid*, paragraph 50.

⁵³ *Ibid*, paragraphs 52 - 55.

⁵⁴ *Ibid*, paragraphs 56 - 58.

⁵⁵ *Ibid*, paragraph 59.

⁵⁶ *Ibid*, paragraph 60.

⁵⁷ *Ibid*, paragraph 61.

⁵⁸ *Ibid*, paragraph 94.

⁵⁹ *Ibid*, paragraphs 85, 86.

⁶⁰ *Ibid*, paragraphs 20 - 42 and 129A (a).

⁶¹ *Ibid*, paragraph 129A (b).

- the status of the decision-maker and the person subject to the decision⁶²
- absence of review by the Administrative Appeals Tribunal/exclusion from the application of the *Ombudsman Act 1976*⁶³
- potential abuse of right to review;⁶⁴and
- that non-citizens should not be able to get the rights and privileges of the Act;⁶⁵

3.49 The Council was divided as to the application of the AD(JR) Act to commercially competitive statutory authorities, recommending by a narrow majority against exemption.⁶⁶

3.50 The Council also recommended that the following decisions be excluded from the operation of the AD(JR) Act:

- decisions relating to the administration of justice⁶⁷
- decisions of the Conciliation and Arbitration Commission (on the basis, in part, of the historical development of the role of the High Court in judicial review of decisions of the Commission and analogous bodies)⁶⁸
- decisions of the Commonwealth Grants Commission relating to the granting of funds relating to the allocation of funds⁶⁹
- decisions made by ASIO under the Australian Security and Intelligence Organisation Act and the Telephonic Interception Act (on the basis that such decisions related to national security. In the case of ASIO employment decisions, review was not considered appropriate)⁷⁰
- decisions relating to armed forces discipline (on the basis of the detrimental effect on the command relationship which is important in the operations of a disciplined force)⁷¹
- certain decisions to withdraw monies in accordance with government appropriations (on the basis that such decisions related to internal financial arrangements made within government)⁷²

⁶² Ibid, paragraphs 129 (e) and 129A (d).

⁶³ Ibid, paragraphs 70 and 129 (b).

⁶⁴ Ibid, paragraphs 171 - 172.

⁶⁵ Ibid, paragraph 171.

⁶⁶ Ibid, paragraphs 68 - 73.

⁶⁷ Ibid, paragraphs 74 - 80. See more detailed discussion later in the discussion paper.

⁶⁸ Ibid, paragraph 124.

⁶⁹ Ibid, paragraph 128.

⁷⁰ Ibid, paragraphs 136 - 138.

⁷¹ Ibid, paragraph 150.

⁷² Ibid, paragraph 154.

- various foreign affairs decisions (on the basis that those decisions relate to Australia's relations with foreign countries and international organisations)⁷³
- decisions of the Advisory Council for Inter-Governmental Relations (on the basis that it dealt only with the relationships *inter se* the organs of government – if necessary, such an organisation should only be subject to judicial review in the High Court, which stands at the apex of both Commonwealth and State judicial systems)⁷⁴
- decisions relating to tax assessment (on the basis of the existence of a long established and well developed system of judicial review of taxation decisions, involving State and Territory Supreme Courts [although not with respect to Sales Tax] the Federal Court [with respect to income tax only] and ultimately the High Court, in the appellate structure. It was noted that '[t]hese courts have power to substitute their assessment for that of the Commissioner, which is not a power available to the Federal Court under the [AD(JR) Act]. The Council also noted that '[u]nder the existing law, tax becomes payable immediately upon the issue of the assessment and the obligation to pay is not deferred pending appeal. Accordingly, there could be strong incentive to challenge the validity of the assessment under the Act, thereby circumventing the existing appellate processes and possibly deferring payment of the tax.');⁷⁵and
- certain migration decisions relating to diplomatic and consular representatives (as such decisions were made on the basis of foreign relations considerations).⁷⁶

Other considerations in seeking to limit judicial review

3.51 More recently, amendments to the Migration Act by the *Migration Reform Act 1992*, the *Migration (Judicial Review) Act 2001* and the *Migration Legislation Amendment (Procedural Fairness) Act 2002* have heightened discussion, from both a constitutional and a policy perspective, on the desirable scope of judicial review. Arguments raised for limiting the scope of judicial review in the context of amendments to the Migration Act have included:

- abuse of process;
- the high volume of applications;
- the need for consistency; and
- cost.

⁷³ Ibid, paragraphs 157 and 158.

⁷⁴ Ibid, paragraph 217.

⁷⁵ Ibid, paragraph 223.

⁷⁶ Ibid, paragraph 170.

3.52 As emphasised in Part I of the discussion paper, many enactments and decision-making schemes reflect a desire on the part of the government to limit judicial review. However, in many instances, extrinsic evidence associated with these enactments (including the Schedule 1 amendment to the AD(JR) Act), provides little indication of the reasons for such limitations.

3.53 In the taxation area, the existence of alternate remedies appears to have been an important consideration. In the explanatory memorandum to the *Administrative Decisions (Judicial Review) Amendment Bill 1980* it is said that:

The purpose of this exclusion [of decisions affecting the assessment or calculation of taxation, including customs and excise duties] is to leave these matters subject only to the ordinary procedures for review or appeal provided in the relevant legislation under which the tax or duty is assessed or calculated, and to prevent these procedures being short circuited by application to the Federal Court for judicial review.

3.54 In its submission in response to draft Council report 32,⁷⁷ the Australian Taxation Office said that:

Recourse to the AD(JR) Act is of limited benefit to a taxpayer genuinely seeking review of an assessment as the Federal Court may only consider whether a decision is made according to law and cannot review the merits of a decision. If review were available under the AD(JR) Act this would undoubtedly be used to delay and frustrate the assessment process and to explore the information the Commissioner possessed in relation to the taxpayer. Perhaps of fundamental importance...to allow review of decisions affecting assessments would radically disturb the onus of proof which, as an integral part of the taxation system, quite properly lies with the payer. It is the taxpayer, not the Commissioner, who is best aware of the taxpayer's own affairs.⁷⁸

3.55 The 'conclusive evidence' provision in section 177 of the *Income Tax Assessment Act 1936* reflects a desire to limit and streamline the assessment and review process. By stating that the production of a notice of assessment is conclusive evidence of its existence, the legislation seeks to avoid litigation by taxpayers delaying the assessment process by requiring the Commissioner in each case to prove the validity of the assessment or justifying the process under which the assessment was raised. The policy underlying section 177 is to promote efficient tax administration by restricting appeals against assessments to the specialist tax law appeal processes.⁷⁹

⁷⁷ Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act*, Report No 32, 1989, paragraph 265.

⁷⁸ It might be remarked that this is a principle of general application since it would include all those who seek to gain benefit/advantage from the government.

⁷⁹ See comments to this effect by the Court in *Kordan Pty Ltd v Commissioner of Taxation* 46 ATR 191.

3.56 In its 32nd report, the Council also notes as a reason for the inclusion of paragraphs (e) and (g) (decisions relating to taxation assessment and calculation and decisions under the *Taxation Administration Act 1953*)⁸⁰ in Schedule 1 to the AD(JR) Act, the long established and well developed system for appeals against taxation decisions.⁸¹ In its first report, *Administrative Decisions (Judicial Review) Act 1977, Exclusions under section 19, - 1978*, the Council also paid cognisance to 'the historical development of the role of the High Court in judicial review of decisions of the [then, Conciliation and Arbitration] Commission and analogous bodies'.⁸² Any potential to delay the collection of revenue would also be of significance.

3.57 Similarly with the *Jurisdiction of Courts (Legislation Amendment) Act 2000* in relation to exemption from the application of the AD(JR) Act of certain decisions in the criminal justice area. There too, related arguments were raised in relation to abuse of process, frustration of the criminal justice system and prolongation of the criminal justice system.

3.58 Other restrictions on judicial review, such as those relating to the validity of appointments, though unstated, would also seem to arise from concerns for the efficacy of the administrative system as a whole, concerns apparently considered in those cases to outweigh the benefits of judicial review for the individual. Similar considerations emerge in the area of workplace relations and public sector employment, where there is a strong emphasis on harmonious working relationships and effective dispute resolution. This is a particularly important consideration where people may have to continue to work along-side each other.

3.59 Regulation 5.1 of the *Public Service Regulations 1999* which contains a statement of general policy concerning review of actions, indicating that it is the policy of the Australian Government that Australian Public Service Agencies should achieve and maintain workplaces that encourage productive and harmonious working environments. The intention of Part 5 is said to be to provide for a fair system of review of APS actions and it is noted that nothing in Part 5 is intended to prevent an application for review from being resolved by conciliation or other means at any time before the review process is completed.

⁸⁰ See Appendix I of this paper.

⁸¹ Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act*, Report No 32, 1989, paragraph 262.

⁸² *Ibid*, paragraph 124.

Discussion point 3

Are there other factors relevant to the executive perspective in seeking to define the desirable scope of judicial review?

Please elaborate.

SECTION III

The public perspective

3.60 In seeking to determine the appropriate scope of judicial review in given situations, it is not only the views and interests of the courts and the executive that need to be taken into account. The best interests of the general public need always to be taken into consideration.

3.61 The concept of administrative justice is relevant to any such consideration, holding, as it does, implications for both the quality and the procedural standards adopted in the making of a decision.

3.62 Elements such as:

- lawfulness
- rationality; and
- fairness

have been said to be relevant to the quality of the decision, while concepts of:

- accessibility
- affordability
- cost to the general public⁸³
- timeliness;⁸⁴ and
- discernible reasons for the decision⁸⁵

have been said to be relevant to the procedural side of administrative justice.⁸⁶

⁸³ At an individual level, few persons affected by administrative decisions have the capacity to undertake an extensive review process. The veterans' review area, where legal aid funding is available for review, provides an exception in this regard.

⁸⁴ As noted elsewhere in this paper, the position with respect to migration and taxation differs in that, in those cases there may be advantages to the applicant in seeking to delay the decision-making process.

⁸⁵ Reflected in section 13 of the *Administrative Decisions (Judicial Review) Act 1977*.

⁸⁶ Justice R S French, 'Administrative Justice in Australian Administrative Law', in Robin Creyke and John McMillan (eds), *Administrative Justice - the Core and the Fringe*, Australian Institute of Administrative Law Inc, 9, 14.

3.63 As stated elsewhere in this discussion paper, while encompassing consideration of questions of lawfulness, procedural fairness, and in extreme situations, the rationality of a decision, judicial review does not provide for the substitution of one administrative decision for another.

3.64 The court has no jurisdiction simply to cure administrative injustice or error. It has therefore been observed that 'the extent of the support able to be given by judicial review processes to administrative justice is considerably circumscribed'.⁸⁷

3.65 Additionally, there is a tension between judicial review and considerations of cost, timeliness and accessibility, all of which are desirable from the point of view of the individual applicant and the general community.

3.66 Judicial review is often more expensive for the parties challenging a decision than merits review, and it is arguable that an external review on the merits will achieve the same outcome and result not only in the setting aside of the decision but the making of the correct or preferable decision in its place.

3.67 It has been said in this respect that:

(I)t is often good policy to commit certain primary decision-making, and the grievance procedures in relation to those primary decisions, to a relatively judge-proof environment. Questions of accessibility (including cost, effectiveness and efficiency) must be relevant to the design of relationships between bodies within a regulatory structure and to their individual and overall relationship in the courts.⁸⁸

3.68 It has also been said that a decision-making system that:

...guarantees ultimate correctness or accuracy in decision-making is likely to run counter to these desirable essentials of the decision-making process. Detailed fact finding, careful balancing of issues,... will be slow. Some persons affected by government decisions can afford to have this occur but they will be few in number.⁸⁹

3.69 In response to such arguments it may be countered that there are significant rights going to the scope of decision-making power and the manner in which it is exercised recognised in the grounds of judicial review, which are not fully replicated in the merits review process.

⁸⁷ Ibid, 22.

⁸⁸ M Aronson, B Dyer, *Judicial Review of Administrative Action*, 2000, p 10.

⁸⁹ Dennis Pearce, 'Is There Too Much Natural Justice' (1992) 12 1994 *AIAL Forum* 9. See also Justice R S French, 'Judicial Review Rights' (March 2001) 28 *AIAL Forum* 30, 31.

3.70 As noted in Part II of the discussion paper, 'The Significance and Constitutional Scope of Judicial Review', judicial review is an essential element of the rule of law and a significant aid to executive accountability, consistency and precedent. All these things are of ultimate benefit to members of the public who experience administrative decision-making.

Discussion point 4

Are there other factors relevant to the public perspective in seeking to define the desirable scope of judicial review?

Please elaborate.

PART IV - THE GROUNDS OF REVIEW AND THE SCOPE OF JUDICIAL REVIEW

INTRODUCTION

SECTION I

The grounds of review

Review of facts
Review of process

SECTION II

A closer look at certain grounds of review

Unreasonableness
Relevant/irrelevant considerations
Error of law
Jurisdictional error
Procedural fairness (including probative evidence)

INTRODUCTION

4.1 In this Part, the Council will examine the reasons why, in certain areas, the nature of the grounds of review themselves might encourage limitations on the scope of judicial review.

SECTION I

The grounds of review

4.2 Notwithstanding the measures taken by the courts to maintain a boundary between merits and judicial review, it is one which is not always easy to maintain. The nature of particular grounds of review highlights this tension. As a result, a number of the grounds of review have become a significant factor for government and courts in seeking to permit, exclude or limit the scope of judicial review.

4.3 The Council considers that it would be useful to undertake a brief analysis of those grounds. The response of courts, administrators and others to the issues raised in relation to such grounds may well be of assistance, in a

broad sense, in identifying policy guidelines for the scope of judicial review and, more narrowly, to the determination of the extent to which those grounds should apply in particular situations.

Review of facts

4.4 A controversial aspect, recognised by both the courts, administrators and others is the open texture of a number of the grounds of review and the extent to which they provide courts with the potential to engage in a subjective reconsideration of the facts (i.e. the merits) of a case.¹

4.5 As stated, the tension between fact and law is a key factor in determining the margins of judicial and merits review.

4.6 On the role of primary decision-makers and tribunals, it has been said that:

Findings of fact are traditionally the domain where a deciding authority or tribunal is master in its own house. Provided only that it stays within its jurisdiction, its findings are in general exempt from review by the courts, which will in any case respect the decision of the body that saw and heard the witness or took evidence directly.²

4.7 However, there is a strong perception that with the assistance of certain grounds of review, the Federal Court has engaged in merits review, particularly in its response to applications for judicial review on the basis of error of law:³

Judicial review's professed indifference to the substantive merits of the impugned decision is not always convincing, and not ultimately reconcilable with some of the grounds of review.⁴

4.8 In so far as they focus the attention of the courts on significant errors of fact or reasoning relied upon by a decision-maker in support of a decision, such grounds:

¹ See discussion by J McMillan, 'Federal Court v Minister for Immigration' (December 1999) 22 *AIAL Forum* 1.

² HWR Wade and CF Forsyth, *Administrative Law*, 1994, p 312. See also J McMillan, 'Federal Court v Minister for Immigration' *ibid*, and J McMillan, 'Recent Themes in Judicial Review of Federal Executive Action' (1996) 24 *Federal Law Review* 347.

³ Sir Anthony Mason, 'Life in Administrative Law Outside the AD(JR) Act', *Australian Institute of Administrative Law (NSW Chapter)*, Seminar, 17 July 1996. See also J McMillan, 'Recent Themes in Judicial Review of Federal Executive Action' *ibid*.

⁴ Mark Aronson, 'A Public Lawyer's Response to Privatisation and Outsourcing' in Taggart (ed), *The Province of Administrative Law*, 1997, 40, 47 - 48. In the footnote to this remark, it is said that 'review for unreasonableness: clearly involves an examination of the impugned decision's merits, albeit from the perspective of a large degree of deference.' See also comments by R Sackville, Commentary on a paper presented by Sir Anthony A Mason, 'Life in Administrative Law Outside the AD(JR) Act', *Australian Institute of Administrative Law (NSW Chapter)*, Seminar, 17 July 1996.

...have a greater tendency than others to blur the line between the legality and the merits of a decision, and provide tools by which a court can re-examine aspects of the merits of a decision.⁵

4.9 Grounds with this potential include:

- unreasonableness;
- the no evidence rule;
- failure to take into account relevant considerations and taking account of irrelevant considerations;
- jurisdictional error;
- the jurisdictional fact doctrine; and
- procedural fairness (including the probative evidence rule, adverse factual material).⁶

Review of process

4.10 Another aspect of the grounds of review which has provoked comment has been the extent to which judicial review may frustrate principles of simplicity, cost and time efficiency by focussing too greatly on the procedures by which a merits review decision is arrived at.

4.11 The ground of procedural fairness is as subjective, and arguably more so, than the grounds of review referred to above. Was an applicant provided with a sufficient opportunity to present their case? Was a decision-maker actually prejudiced or, in the case of apprehended bias, has there been conduct or some event involving the decision-maker that might undermine public confidence in the administrative process?

4.12 Although:

The authorities show that natural justice does not require the inflexible application of a fixed body of rules; it requires fairness in all the circumstances, which include the nature of the jurisdiction or power exercised and the statutory provisions governing its exercise.⁷

and:

⁵ David Bennett QC, Commonwealth Solicitor-General, 'Balancing Judicial Review and Merits Review' (September 2002) 53 *Admin Review* 5.

⁶ In *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 356 where Mason CJ submitted that care should be taken to ensure that grounds of judicial review like 'no evidence', 'probative evidence' and 'error of law' do not become vehicles for converting judicial review into a search for errors of fact.

⁷ *National Companies and Securities Commission v News Corporation Ltd* (1984) 156 CLR 296, 312 per Gibbs CJ.

There are...no words which are of universal application to every kind of enquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, and the subject matter being dealt with.⁸

4.13 Following the decision of the High Court in *Kioa v West*,⁹ in which it was held that where the rules of procedural fairness operate, applicants are entitled to be heard in respect of all matters that are crucial or critical to the decision-making process, the ground presented administrators with significant resource and logistical difficulties.¹⁰

SECTION II

A closer look at certain grounds of review

4.14 The Council believes that an appreciation of the scope and purpose of each of the following grounds of review is useful in measuring their operation in the context of merits and judicial review.

*Unreasonableness*¹¹

4.15 This ground rests on the premise that:

...when a discretionary power is statutorily conferred on a repository, the power must be exercised reasonably, for the legislature is taken to intend that the discretion be so exercised.¹²

4.16 Categories of unreasonableness include:

- that the decision was devoid of plausible justification¹³
- the giving of excessive or inadequate weight to a consideration¹⁴
- making an erroneous finding of fact on a point of importance¹⁵
- failure to have proper regard to departmental policy or representation¹⁶
- the unnecessarily harsh effect of the decision¹⁷

⁸ Lord Justice Tucker in *Russell v Duties of Norfolk* [1949] 1 All ER 109, 118 (CA).

⁹ (1985) 159 CLR 550.

¹⁰ See Dennis Pearce, 'Is There too much Natural Justice?' 1994 *AIAL Forum* 94.

¹¹ The common law position has been entrenched in paragraphs 5(2)(g) and 6(2)(g) of the AD(JR) Act.

¹² *Kruger v The Commonwealth* (1997) 190 CLR 1, 36 per Brennan J. Adopted also by Gummow J in *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611, 650.

¹³ *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379.

¹⁴ *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24.

¹⁵ *GTE (Australia) v Brown* (1986) 14 FLR 309.

¹⁶ *Nikac v Minister for Immigration and Ethnic Affairs* (1988) 20 FCR 65.

¹⁷ *Edelsten v Wilcox and FCT* (1988) 83 ALR 99.

- failure to give genuine, proper and realistic consideration to a matter including making adequate inquiry as to facts¹⁸
- demonstrable inconsistency with other decisions;¹⁹and
- discrimination without a rational distinction.²⁰

4.17 'Unreasonableness' is, accordingly, a broad head of judicial review, with the potential to stem executive excess by filling gaps not covered by more specifically stated grounds.²¹

4.18 The ground 'crystallised' from the decision of Lord Greene MR in *Associated Provisional Picture Houses Ltd v Wednesbury Corporation*.²² There it was restricted to capturing decisions so unreasonable that no reasonable person could ever have come to them.²³ The intention was not to capture administrative decisions regarded as 'less reasonable' than those which the reviewer might have made.

4.19 In Australia, the essentially circular language of the *Wednesbury* unreasonableness test was rephrased in a number of cases.²⁴ Indeed, in the context of migration decision-making, it has been remarked that by the end of the 1980s:

Some judges were very cautious, stressing that a mere difference in opinion or a preference for a different result could not justify a finding of unreasonableness. However others took a more interventionist and critical approach...²⁵

4.20 By way of response to the expansive interpretation adopted by the courts in some cases, unreasonableness was excluded as a ground of review under former Part 8 of the Migration Act on the basis that:²⁶

¹⁸ Although according to Wilcox J in *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 159 CLR 550, 570, '[t]he circumstances in which a decision will be invalid for failure to inquire are...strictly limited'.

¹⁹ *Kruse v Johnston* [1898] 2 QB 91; *Fares Rural Meat and Livestock Co Pty Ltd* (1990) 96 ALR 153.

²⁰ *The Council of the City of Parramatta v Pestell* (1972) 128 CLR 305.

²¹ Empirical research suggests that this ground is one of the most frequently relied on by applicants, and that it is upheld in the courts in 21.1% of cases, Robin Creyke and John McMillan, 'Success in Judicial Review - An Empirical Study', forthcoming AIAL.

²² [1948] 1 KB 223.

²³ *Ibid*, 233, 234

²⁴ In *Attorney-General (NSW) v Quin* (1989) 170 CLR 1, 36 it was said by Brennan J that the decision must amount to 'an abuse of power'; in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 290, Mason CJ and Deane J used the words 'so devoid of plausible justification that no reasonable person could have taken that course'. For a full discussion of this topic see Rossana Panetta, 'Wednesbury Unreasonableness: Judicial or Merits Review?' (2002) 9(4) *Australian Journal of Administrative Law* 191.

²⁵ Mary Crock, 'Judicial Review and Part 8 of the Migration Act: Necessary Reform or Overkill?' (September 1996) 18 *Sydney Law Review* 267.

²⁶ Section 476(2). This provision was challenged and upheld in *Abebe v Commonwealth; Re Minister for*

It has long been recognised that this ground of review, if not interpreted with great care and precision, will come close to a review of a decision on the merits, especially where review on the merits is not available.²⁷

4.21 Where unreasonableness remains available as a ground of review, both the High Court and the Federal Court have held that its scope must be limited. For instance, the Federal Court has said that:

We must again stress the limited nature of judicial review on the ground of unreasonableness. That ground is not available as a vehicle to obtain the judgment of the court on matters that in the end are not concerned with the legality of a decision but with contested views about its wisdom or substantive fairness – judgments about matters of that nature are to be made elsewhere by the community and its political representatives; the concern of the court is only with the legality of decisions.²⁸

4.22 Additionally, the High Court has indicated that unreasonableness should not be equated with irrationality and indeed, an unreasonable decision can be valid notwithstanding that the underlying reasoning process was logically flawed.²⁹

4.23 Further:

Someone who disagrees strongly with someone else’s process of reasoning on an issue of fact may express such disagreement by describing the reasoning as ‘illogical’ or ‘unreasonable’ or even ‘so unreasonable that no reasonable person could adopt it.’ If these are merely emphatic ways of saying that the reasoning is wrong, then they have no particular legal consequence.³⁰

4.24 In this case, it was also noted that:

...the fact that a decision involves an error of law does not mean that it is unreasonable.³¹

and

Immigration and Multicultural Affairs (1999) 162 ALR 1.

²⁷ *Explanatory Memorandum to the Migration Reform Bill 1992*, paragraph 415. Further, as pointed out by Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 42, when the ground of asserted unreasonableness is given too much or too little weight to one consideration or another: ‘a court should proceed with caution...lest it exceed its supervisory role by reviewing the decision on its merits’.

²⁸ *City of Botany Bay Council v Minister for Transport and Regional Development* (1999) 58 ALD 628, 637 per Black CJ, Lee and Weinberg JJ.

²⁹ *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321.

³⁰ *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611, 626 per Gleeson CJ and McHugh J.

³¹ *Ibid*, 640 per Kirby and Gaudron JJ.

...an unreasonable decision is one for which no logical basis can be discerned.³²

4.25 Nonetheless, there is always the potential for expansion. The obligation has expanded over time to become more onerous and open-ended.³³

4.26 This has occurred for instance in relation to the duty to conduct an adequate inquiry, whereby a decision-maker may act unlawfully by not attempting to obtain information 'when it is obvious that material is readily available which is centrally relevant to the decision to be made'³⁴ or where the available material 'contains some obvious omission or obscurity that needs to be resolved before a decision is made'.³⁵

*Relevant/irrelevant considerations*³⁶

4.27 During the 1980s, one of the bases frequently used for invalidating migration decisions was the principle that the obligation of a decision-maker to give consideration to relevant matters is an obligation to give 'proper, genuine and realistic consideration to the merits of the case'.³⁷ Directed at discouraging the making of perfunctory declarations that all relevant matters have been taken into account, in circumstances where a decision appeared harsh or unwarranted, this ruling provided scope for courts to be persuaded that the merits of the case had not been given appropriate consideration.³⁸

4.28 While it could be construed as providing an unfettered discretion, where the statute or grant of power is silent on the matters to be taken into account, the nature of the statute may suggest some limits and it has been held that:

In a case...where relevant considerations are not specified, it is largely for the decision-maker, in light of matters placed before him by the parties, to determine which matters he regards as relevant and the comparative importance to be accorded to matters which he so regards. The ground of failure to take into account a relevant consideration will only be made good if it is shown that the decision-maker has failed to

³² Id.

³³ See discussion by J McMillan, 'Recent Themes in Judicial Review of Federal Executive Action' (1996) 24 *Federal Law Review* 347, 381-2; R Creyke, 'The Impact of Judicial Review on Tribunals: Recent Developments', paper presented at the AIJA Tribunals Conference, Melbourne, 6 June 2002.

³⁴ *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 65 ALR 549, 563 per Wilcox J.

³⁵ *Videto v Minister for Immigration and Ethnic Affairs* (1986-7) 69 ALR 342, 353 per Toohey J.

³⁶ This ground also appears in section 5(2)(b) of the AD(JR) Act which, in this regard, is substantially declaratory of the common law.

³⁷ *Khan v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 292, 292 per Gummow J.

³⁸ See J McMillan, 'Federal Court v Minister for Immigration' (December 1999) 22 *AIAL Forum* 1, 4. This approach to judicial review was subsequently closed down in 1992 by the omission from Part 8 of the Migration Act of the failure to consider relevant matters as a ground for judicial review.

take into account a consideration which he was, in the circumstances bound to take into account for there to be a valid exercise of the power to decide.³⁹

4.29 In *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*,⁴⁰ Mason J noted the following features of this and the related ground of taking into account irrelevant considerations:

- the ground of failure to take into account a relevant consideration can only be made out if a decision-maker fails to take into account a consideration which he or she is bound to take into account in making that decision; and
- what factors a decision-maker is bound to consider in making the decision is determined by construction of the statute conferring the discretion. If the statute expressly states the considerations to be taken into account, it will often be necessary for the court to decide whether those enumerated factors are exhaustive or merely inclusive. If the relevant factors are not expressly stated, they must be determined by implication from the subject matter, scope and purpose of the Act.

4.30 Although both these decisions leave open the question as to what the decision-maker was 'bound' to do and what are the indications of obligation, thereby affording the ground the capacity for use as a basis for de facto merits review,⁴¹ Australian courts have trodden a careful path in this regard. As also noted by Mason J in *Peko-Wallsend Ltd*:

The limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind. It is not the function of the court to substitute its own decision for that of the administrator by exercising a discretion which the legislature has vested in the administrator. Its role is to set limits on the exercise of that discretion, and a decision made within those boundaries cannot be impugned.

It follows that in the absence of any statutory indication of the weight to be given to various considerations, it is generally for the decision-maker and not the court to determine the appropriate weight to be given to the

³⁹ *Sean Investments v McKellar* (1981) 38 ALR 363, 375 per Deane J.

⁴⁰ (1986) 162 CLR 24, 40-41.

⁴¹ See for instance the case of *Roberts v Hopwood* [1925] AC 578, now largely discredited in Australia, involving a statute empowering the Council to pay its employees 'such salaries as it may see fit'. See also *Minister for Immigration, Local Government and Ethnic Affairs v Pashmforoosh* (1989) 18 ALD 77, 80 per Davies, Burchett and Lee, where it was held that the consideration of an irrelevant matter will occur by '[t]he taking into account of a fact found 'unreasonably', or proceeding upon an erroneous premise on a fundamental matter. See also *Akers v Minister for Immigration, Local Government and Ethnic Affairs* (1988) 16 ALD 688, 694 per Lee J.

matters which are required to be taken into account in exercising the statutory power.⁴²

4.31 This approach was supported by the High Court majority in *Minister for Immigration and Multicultural Affairs v Yusuf*,⁴³ where it was pointed out that questions of fact material to the ultimate decision are determinable by way of the subjective thought processes of the decision-maker, not the objective or external assessment of the court.

Error of law

4.32 At common law, errors of law must go to jurisdiction except in the case of applications under the writ of certiorari, which covers non-jurisdictional errors of law on the face of the record. At common law, the ground of error of law on the face of the record has been severely restricted. However, empirical work on this project has underlined how often the courts use this ground.⁴⁴

4.33 The distinction between errors of law on and off the record does not exist under the AD(JR) Act, with both jurisdictional and non-jurisdictional errors being reviewable on or off the record.⁴⁵ The only preconditions to the statutory grounds are that the error goes to jurisdiction and must have affected or possibly affected the outcome:

A decision does not 'involve' an error of law unless the error is material to the decision in the sense that it contributes to it so that, but for the error, the decision would have been, or might have been, different.⁴⁶

4.34 There is no error of law in making a wrong finding of fact.⁴⁷ However, to the extent that the courts draw distinctions between matters of law and fact, both the statutory and the common law grounds of review have the potential to allow courts to move into areas of merits review that are, arguably, more appropriately dealt with by tribunals.

4.35 Determining what constitutes an error of law can be difficult:

⁴² (1986) 162 CLR 24, 40-41.

⁴³ (2001) 206 CLR 323, [68] per McHugh, Gummow and Hayne JJ.

⁴⁴ R Creyke, J McMillan, 'Litigants Perception of Administrative Law - An Empirical Study', forthcoming, 2003. This study suggests that 'error of law' is the ground of review most frequently relied upon by applicants, with a success rate of 42.3%. 'Relevant consideration' is the second most frequently relied on ground, with a success rate of 35.3%.

⁴⁵ Under former Part 8 of the Migration Act there was error of law in the event of an incorrect application of the law to the facts as found by the person who made the decision, whether or not the error appeared on the face of the record.

⁴⁶ *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 353 per Mason CJ. See also comments by Toohey and Gaudron JJ at 384.

⁴⁷ *Waterford v Commonwealth* (1987) 163 CLR 54, 77.

No matter what the abstract definitions might be, practitioners appreciate that what counts for an error of law in one field, or even in one period, might not be so counted in a different field or period...

Lying behind any definition of error of law are assumptions that there is a difference between the primary facts, materials, judicial notice and experiential knowledge of the decision-maker on the one hand and the application to those facts 'as found' of legal terms and standards on the other hand.⁴⁸

Jurisdictional error

4.36 Error of law going to jurisdiction, or jurisdictional error, has become a key ground of review in cases in which there has been recourse to the Constitutional writs of prohibition and mandamus.⁴⁹ No distinction is made for the purposes of jurisdictional error between errors of law and errors of fact.

4.37 *Craig v South Australia*⁵⁰ is authority for the view that what constitutes a jurisdictional error of law is much wider for an administrator or tribunal than for a court.

4.38 Despite concern that judicial review 'engage the practical realities of decision-making and bear witness to a tolerance of non-critical error of law',⁵¹ in *Craig's* case, it was held that jurisdictional error exists where:

...an administrative tribunal falls into error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or reach a mistaken conclusion, and the tribunal's exercise or purported of power is thereby affected, it exceeds its authority or powers.⁵²

4.39 More recently, in *Yusuf, McHugh, Gummow and Hayne JJ* with the concurrence of Gleeson CJ and Gaudron J have said that:

'Jurisdictional error' can thus be seen to embrace a number of different kinds of error, the list of which, in the passage cited from *Craig*, is not exhaustive. Those different kinds of error may well overlap. The

⁴⁸ M Aronson, B Dyer, *Judicial Review of Administrative Action*, 2000, p 159.

⁴⁹ See general discussion of the Constitutional writs and section 75(v) of the Constitution in *Plaintiff S157/2002 v Commonwealth of Australia* [2003] HCA 2, [79 - 83] per Gaudron, McHugh, Gummow and Hayne JJ.

⁵⁰ (1995) 184 CLR 163, 179.

⁵¹ Justice R S French, 'Judicial Review Rights' (March 2001) 28 *AIAL Forum* 30. Some decisions support an overt deference to the opinion of the decision-maker on questions of law: see for instance, comments per Kirby J in *Australian Broadcasting Commission v Bonner* (1984) 54 ALR 653, 668-9.

⁵² *Craig v South Australia* (1995) 184 CLR 163, 179.

circumstances of a particular case may permit more than one characterisation of the error identified, for example, as the decision-maker both asking the wrong question and ignoring relevant material. What is important, however, is that identifying a wrong issue, asking a wrong question, ignoring relevant material or relying on irrelevant material in a way that affects the exercise of power is to make an error of law. Further, doing so results in the decision-maker exceeding the authority or powers given by the relevant statute. In other words, if an error of those types is made, the decision-maker did not have authority to make the decision that was made; he or she did not have jurisdiction to make it.⁵³

4.40 There are other cases where grounds of review have been linked to an excess of jurisdiction. In *Re Refugee Tribunal; ex parte Aala*,⁵⁴ it was held that the Constitutional writs would apply where a decision was made in breach of the rules of procedural fairness, as such a breach would represent an excess of jurisdiction. As noted by Gaudron and Gummow JJ in that case:

If an officer of the Commonwealth exercising power conferred by statute does not accord procedural fairness and if that statute has not on its proper construction, relevantly (and validly) limited or extinguished any obligation to accord procedural fairness, the officer exceeds jurisdiction in a sense necessary to attract prohibition under section 75(v) of the Constitution.⁵⁵

4.41 So too, in *Minister for Immigration and Multicultural Affairs v Eshetu*, Gummow J expressly linked unreasonableness to section 75(v) of the Constitution.⁵⁶

4.42 These recent decisions indicate a tendency to adopt a wider not a narrower view of jurisdictional error with a commensurate risk of becoming involved in merits review.

4.43 It has been remarked, having regard to this approach, that:

The legal rules giving rise to the traditional grounds of judicial review are in this way linked by a common theme. They are not discrete and freestanding. They are all aspects of jurisdiction. They serve to identify the scope of a decision-maker's power and the conditions of its valid exercise.⁵⁷

⁵³ *Minister for Immigration and Ethnic Affairs v Yusuf* (2001) 206 CLR 323, [80].

⁵⁴ (2000- 2001) 204 CLR 82.

⁵⁵ *Ibid*, 101. See also *Plaintiff S157/2002 v Commonwealth of Australia* [2003] HCA 2.

⁵⁶ (1999) 197 CLR 611, [126]. His view does not appear to have attracted any support from the present majority of High Court judges.

⁵⁷ Stephen Gageler, 'The Legitimate Scope of Judicial Review' (November 2001) 21(3) *Australian Bar Review* 279, 291.

4.44 An element of the error of law and jurisdictional error grounds is that an error of fact which goes to jurisdiction will be a ground of relief. Jurisdictional fact review proceeds on the basis that it is a ground of invalidity for an official to exercise discretionary executive power in the absence of a jurisdictional fact.⁵⁸

4.45 It has been noted that, although once rare and confined largely to the review of constitutional facts, review on this ground is on the increase and that:

...there is an obvious risk of divergent outcomes when there are two separate investigations of a jurisdictional fact.⁵⁹

4.46 Factors contributing to this risk are said to include:

- different evidence before the tribunal and the court
- the fact that the tribunal is not bound by the rules of evidence
- the extent to which tribunal decision-makers may draw on their own knowledge in reaching a decision
- the susceptibility of material generally to different interpretations; and
- the time gap between the reaching of the respective decisions.

Procedural fairness (including probative evidence)

4.47 The doctrine of procedural fairness represents an important aspect of good administration. Ways in which it does this include by:

- appealing to a fundamental sense of justice
- ensuring that all the necessary information is obtained from the parties
- ensuring high quality impartial decisions; and
- fostering public confidence in the fairness of the administrative system.

4.48 Traditionally, the doctrine had two elements:

- that a decision-maker must afford an opportunity to be heard to a person whose interests will be adversely affected by a decision; and
- that a decision-maker must be impartial and disinterested in the matter to be decided.

4.49 The probative evidence rule, to be considered in more detail below, may be regarded as a further aspect of procedural fairness rule.

⁵⁸ *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135.

⁵⁹ Mark Aronson, 'Resurgence of Jurisdictional Fact' (March 2001) 12(21) *Public Law Review* 17, 27.

4.50 There are two steps indicating whether there has been a breach of this ground: is there an implication that procedural fairness applies. If so, what fair process should have been applied (content). It is only when a positive answer is given to the first question and a negative answer to the second that a breach of the ground of review is made out. The no bias rule and the probative evidence rule only apply to the second of these questions.

Right to be heard

4.51 The relevant principles are stated as follows in the judgment of Mason J in *Kioa v West*:

It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is to be made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it ... The reference to 'right or interest' in this formulation must be understood as relating to personal liberty, status, preservation of livelihood and -reputation, as well as to proprietary rights and interests.⁶⁰

4.52 At the same time the courts have maintained the view that procedural fairness is not a universally available right. Certain factors must be present before it will be implied as a principle of common law. Further, the implication can be excluded.

4.53 In *Mahon v. Air New Zealand*, Lord Diplock said in delivering the judgment of the Privy Council that the repository of a power to inquire and make findings and who contemplates making an unfavourable finding:

...must listen fairly to any relevant evidence conflicting with the finding and any rational argument against the finding that a person represented at the inquiry, whose interests (including in that term career or reputation) may be adversely affected by it, may wish to place before him or would have so wished if he had been aware of the risk of the finding being made.⁶¹

4.54 As also noted by Brennan J in *Annetts v McCann*:

This is a general principle which, subject to any contrary intention expressed or implied in the statute, applies to statutory inquiries in

⁶⁰ (1985) 159 CLR 550, 583.

⁶¹ (1984) AC 808, 820.

which the inquisitor is authorized to publish findings that might reflect unfavourably on a person's conduct.⁶²

4.55 However such exclusion must be in specific terms. More recently in *Minister for Immigration and Multicultural Affairs; Ex parte Miah* it has been said that:

It is now settled that, when a statute confers on a public official the power to do something which affects a person's rights, interests or expectations, the rules of natural justice regulate the exercise of that power "unless they are excluded by plain words of necessary intendment".⁶³

4.56 It was also argued,⁶⁴ amongst other things, that because the Migration Act established a mandatory duty to inform applicants about certain kinds of information, Parliament could not have intended that a similar duty should be imposed in relation to other types of information.

4.57 In rejecting this argument, McHugh J said that:

An intention on the part of the legislature to exclude the rules of natural justice is not to be assumed nor spelled out from "indirect references, uncertain inferences or equivocal considerations". Nor is such an intention to be inferred from the presence in the statute of rights which are commensurate with some of the rules of natural justice.⁶⁵

...so to argue is to fall into the error of inferring from the presence of some matters concerned with natural justice that Parliament intended to exclude natural justice in all other respects.⁶⁶

Bias

4.58 Bias may be actual or apprehended and may manifest itself in the decision-maker's personal associations, interests or in the structure of the decision-making process.⁶⁷

⁶² (1990) 170 CLR 596, 609 per Brennan J. Sir Anthony Mason has said, subsequently, that '[I]t may be that this suggestion falls short of providing a test which is instructive and helpful', *The Brennan Legacy, Blowing the winds of legal orthodoxy*, 2002, p 53.

⁶³ (2001) 206 CLR 57, [126] per McHugh J.

⁶⁴ *Ibid*, [139].

⁶⁵ *Ibid*, [126] per McHugh J. See also *S157/2002 v Commonwealth of Australia* [2003] HCA 2, [30] per Gleeson CJ and *Re Refugee Tribunal; Ex parte Aala* (2000 - 2001) 204 CLR 82, [41] per Gaudron and Gummow JJ.

⁶⁶ *Ibid*, per McHugh J [126], [139]. In response to this decision, in late December 2001, a Bill was introduced into the Parliament, the *Migration Legislation (Procedural Fairness) Bill 2001*, which seeks 'to provide clear legislative intention that the codes the Bill specifies are to betaken to be an exhaustive statement of the common law natural justice hearing rule'; see the Explanatory Memorandum to the Bill, paragraph 4. report on the Bill by the Senate Legal and Constitutional Committee for inquiry., tabled its report on 5 June 2002, recommended(with one dissenter) that the Bill proceed. The Bill was assented to on 3 July 2002.

⁶⁷ See for instance *Webb v The Queen* (1994) 181 CLR 41, 74, referred to in the majority judgment of

4.59 Subject to the need to accommodate differences between court proceedings and proceedings before other kinds of tribunals, the High Court has said that the rule against bias would be as applicable to a tribunal as to a court.⁶⁸

4.60 In *Minister for Immigration and Ethnic Affairs v Jia's* case, however, it is suggested that what might constitute a breach of procedural fairness depends to a degree on the nature of the decision-making body, that is, whether the body is a court, tribunal or a Minister. As a result, what would be categorised as pre-judgment in a court, will not necessarily be so classified in relation to a tribunal, which is expected to build up expertise in matters such as country information (for instance the Refugee Review Tribunal).⁶⁹

Probative evidence⁷⁰

4.61 This rule has links with unreasonableness and with error of law on the face of the record⁷¹ although it would seem that, in Australia at least, it should not be equated to error of law.⁷² It is best regarded, however, in the context of the ground of procedural fairness. In *R v Deputy Industrial Injuries Commission, ex parte Moore*, Diplock LJ noted that natural justice requires that tribunal's decisions are based on some evidence of probative value, that is:

The requirement that a person exercising quasi-judicial functions, must base his decision on evidence means no more than it must be based upon material which tends logically to show the existence or non-existence of facts relevant to the issues to be determined, or to show the likelihood or unlikelihood of the occurrence of some future event the occurrence of which would be relevant.⁷³

4.62 What is substantive or adequate is inevitably affected by one's perception of the justice or injustice of the particular decision. In common with the 'extended *ultra vires*' grounds of unreasonableness, irrelevant/relevant considerations and error of law, this ground could provide recourse to re-examination of the facts of a case. As with those grounds, however, the courts have trodden warily.

Gleeson CJ, McHugh, Gummow and Hayne JJ in *Ebner v the Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group* (2000) 176 ALR 644.

⁶⁸ See *Ebner v the Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group* (2000) 176 ALR 644.

⁶⁹ (2001) 205 CLR 507, [180]-[181] per Hayne J. See also Kirby J in this case to the effect that notwithstanding differences between the roles of judicial officers and tribunal members, the standards for apprehended bias are in both cases rigorous, [115].

⁷⁰ Sections 5 and 6 of the AD(JR) Act expressly authorise review on the ground that there was 'no evidence or other material' to justify the decision when some particular fact is to be established.'

⁷¹ *R v Northumberland Compensation Appeal Tribunal; Ex parte Shaw* [1952] 1 KB 338.

⁷² See *Minister for Immigration and Multicultural Affairs v Epeabaka* (1998) 84 FCR 411 per Black CJ, von Doussa and Carr JJ.

⁷³ (1965) 1 QB 456, 488. See also the Privy Council in *Mahon v Air New Zealand* [1984] AC 808.

4.63 According to Lord Diplock, the obligation ensuing from the probative evidence rule:

...means that [the decision-maker] must not spin a coin or consult an astrologer, but he may take into account any material which, as a matter of reason, has some probative value in the sense mentioned above. If it is capable of having any probative value, the weight to be attached to it is a matter for the person to whom the Parliament has entrusted the responsibility of deciding the issue. The supervisory jurisdiction of the High Court does not entitle it to usurp this responsibility and to substitute its own views for his.⁷⁴

4.64 Because of its tendency to blur the merits/judicial review boundary, the High Court has also cautioned against too heavy a reliance on this rule.⁷⁵

Content of procedural fairness

4.65 As intimated earlier in this Part, identification of what constitutes procedural fairness in a particular case can vary:

The definition of fair procedures to govern the making of every determination affecting the interests of an individual is a formidable task. Indeed, the almost infinite range of factors preclude an a priori definition of precise procedures to guide every administrator in the exercise of his power in every case. Some agencies have power to summon witnesses, some do not. Some can compel the production of documents, some can not. Some are bound by the constraints of confidentiality, some are not. Some administrative decisions depend on clearly defined facts, some require a rather diffuse inquiry. Some decisions owe little to policy, some owe a lot. Some administrative decisions are made at leisure, some must be made on the moment. Across the broad spectrum of administrative decision-making, the principles of natural justice require that the procedure be fair in all the circumstances.⁷⁶

4.66 In some cases where the rules relating to the right to be heard are applicable:

...nothing less than a full and unbiased hearing of each affected individual's case will satisfy them. In other circumstances, something less may suffice. Thus, the circumstances of a particular case may be such that procedural fairness does not require that each person affected be accorded an effective opportunity of being personally heard before a

⁷⁴ *R v Deputy Industrial Injuries Commission, ex parte Moore* (1965) 1 QB 456, 488 per Diplock LJ.

⁷⁵ *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 31 ALR 666, 690.

⁷⁶ Justice Brennan, 'The Purpose and Scope of Judicial Review' (1986) 2 *Australian Bar Review* 73, 104-5.

decision is made but nonetheless requires that the decisions-maker be and appear to be, personally unbiased.⁷⁷

The judicial perspective

4.67 The courts have regarded this rule as one of fundamental importance and one that may only be displaced in the event of a clear statutory intention to that effect. This is reflected in the decision of the High Court in *Kioa v West*, where it was said that:

The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention.⁷⁸

4.68 Although concern has been expressed that procedural fairness should not be pursued inflexibly to the detriment of efficient decision-making⁷⁹ it has been said that:

It is not the purpose of section 75(v) of the Constitution to engage the jurisdiction of the Court through the decisions of administrative decision-makers to decide whether or not some minor or inappropriately worded reference to the material upon which the decision-maker relies has not been brought to the attention of the person affected. Something more is required to demonstrate an arguable breach of the rules of natural justice.⁸⁰

The executive perspective

4.69 As a result of the decision in *Kioa v West*⁸¹ migration officials were obliged to afford applicants an adequate opportunity to present all matters relevant to their case,⁸² although no judge went so far as to require formal or informal oral hearings.

4.70 In areas with many elements to the decision-making process, it has been suggested that this requirement can become both onerous and

⁷⁷ *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648, 652 per Deane J. See also *Kioa v West* (1985) 159 CLR 550, 632-3 per Deane J.

⁷⁸ *Kioa v West*, *ibid*, 584. See also the judgments of Wilcox J and French J in *NAAV v Minister for Immigration & Multicultural & Indigenous Affairs* (2002) 69 ALD 1 and of the Court in *S157/2002 v Commonwealth of Australia* [2003] HCA 2.

⁷⁹ *McInnes v Onslow Fane* (1978) 1 WLR 1520.

⁸⁰ *Re Minister for Immigration and Multicultural Affairs; Ex parte Brian Gerald James Goldie*, 3/9/01, Kirby J (Chambers).

⁸¹ (1985) 159 CLR 550.

⁸² *Somaghi v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 31 FCR 100.

unnecessary.⁸³ In these circumstances, the courts have adopted the view that the overall process must be fair.⁸⁴

4.71 It has been noted in this regard that:

Procedural fairness is the great protection against bureaucratic unfairness. The question is not whether we have too much natural justice - the principle of natural justice must drive decision-making. The real issue is that those who are creating models for the procedure to be followed, whether they be public servants or judges, need to be aware that an excess of procedure can be counter-productive. It cannot be assumed that the provision of additional procedural challenges will necessarily be to the advantage of persons affected by the decision in question.⁸⁵

4.72 For ordinary people, considerations of cost, speed, finality and accessibility will also be important elements.

4.73 At the same time, note the procedural standards imposed on the public sector, particularly procedural fairness, have led to a general improvement in primary decision-making.⁸⁶

Discussion points 5 and 6

4.74 As remarked by the Council in 1989 in its 32nd report, *Review of the Administrative Decisions (Judicial Review) Act: the Ambit of the Act*:

...in the Council's view, judicial review cases in Australia have generally shown the courts to be careful to ensure that the administrative processes by which government is carried on does not become a series of justiciable controversies.⁸⁷

⁸³ In the *Migration Reform Bill 1992*, the Government sought to address these difficulties.

As noted by the Hon Gerry Hand, former Minister for Immigration:

'Under the reforms, the decision-making procedures will be codified. This will provide a fair and certain process with which both applicant and decision-maker can be confident. Decision-makers will be able to focus on the merits of each case knowing precisely what procedural requirements are to be followed. These procedures will replace the somewhat open-ended doctrines of natural justice and unreasonableness...

As the codified procedures will allow an applicant a fair opportunity to present his or her claims, failure to observe the rules of natural justice and unreasonableness will not be grounds of review.'

See Hon Gerry Hand, Minister for Immigration and Ethnic Affairs, Second Reading Speech to the Migration Reform Bill 1992, *Hansard*, 4 November 1992.

⁸⁴ *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648.

⁸⁵ Dennis Pearce, 'Is There Too Much Natural Justice?' (1992) 1 *AIAL Forum*, 94.

⁸⁶ See recent comments by Anthony Blunn AO, 'Administrative Decision-Making - An Outsider Tells' to be published in *AIAL Forum* in 2003.

⁸⁷ Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act*, Report No 32, 1989, paragraph 24.6.

4.75 Discussion of the grounds of review in the preceding section of this paper has not dislodged this view.

4.76 However, the scope of certain grounds of review is not fixed. Grounds may expand or contract in response to a range of considerations, and there is not always a congruence between the perceptions of the courts and the executive at any given point in time as to 'how much' and 'why'. Inevitably, this will render the relationship between the courts and the executive an uneasy one.

4.77 Having regard to the nature of the grounds of review examined in this discussion paper, and to the way in which the courts have generally addressed those grounds, the view might reasonably be taken that no ground, in itself, without more, warrants the exclusion of judicial review. However, there are clearly other significant factors, such as cost, consistency and predicability which may need to be addressed. It is the 'other' and the 'by whom' elements that the Council proposes to address in the following Parts of this discussion paper.

(5)

Do you agree/not agree with these views?

Please explain why/why not.

(6)

Are there other matters associated with the grounds of judicial review discussed above or of any other grounds of review which are of relevance/concern in seeking to determine the appropriate scope of judicial review?

Please elaborate.

PART V - PROPOSED CONSIDERATIONS IN DEVELOPING A GUIDE TO THE SCOPE OF JUDICIAL REVIEW

SECTION I

Proposed considerations

SECTION II

Consistency/predictability

A case study

The migration experience

Abuse of review process

Previous Council consideration

Resource-related issues

The executive perspective

The judicial perspective

Previous Council consideration

Contributing factors and responses

SECTION III

Nature of the decision

Policy and policy decisions *Decisions related to the administration of justice*

Decisions where there are ongoing relationships

Legislative decisions

Decisions made in urgent or emergency contexts

SECTION IV

Nature of the decision-maker

Status of the decision-maker

Expert decision-makers

Outside contractors

Government business enterprises

Decisions by certain other government bodies

SECTION V

Other

No impact on final decision

No injustice

SECTION I

Proposed considerations

5.1 Having regard to issues discussed in the preceding Parts of the discussion paper, the following considerations have been identified as relevant to the scope of judicial review:

- Consistency/predictability
- Resource-related issues:
 - cost/volume;
 - abuse of process;
- Nature of the decision:
 - policy and polycentric issues
 - where there are ongoing relationships
 - legislative matters
 - matters relating to the administration of justice; and
 - the urgency or emergency of the circumstances.
- Nature of the decision-maker:
 - status
 - expertise
 - being an outside contractor
 - government business enterprises
 - inter-governmental bodies; and
 - consultative and advisory authorities dealing directly with the public.
- Other:
 - no impact on final decision/no injustice.
- Alternative remedies available.

Discussion point 7

Do you agree with the items included in this list?

Are there items that should be added to or removed from the list?

Please elaborate.

SECTION II

Consistency/predicability

5.2 It has been accepted that an underlying value of administrative justice is consistency in administrative decision-making¹ and that there is a potential for inconsistencies to develop if limits are placed on review.

5.3 Inconsistency and unpredictability in decision-making outcomes may suggest unfairness, sometimes graphically, where there are fiscal implications associated with decisions.

5.4 It has been said in that respect that the courts had a role in the development of:

...coherent and explicable legal principles which provide administrators, the public, and their legal advisers, with clear guidelines whilst at the same time retaining sufficient flexibility to allow an appropriate balance between the public and private aspects of the public interest in the infinite variety of circumstances that come before the courts.²

A case study

5.5 Parts XIA (The Repatriation Medical Authority) and XIB (Specialist Medical Review Council)³ were included in the *Veterans' Entitlements Act 1986* (the VEA) in response to concerns that the interpretation given to section 120 of the Act (reasonable hypothesis linking a veteran's injury, disease or death with service) resulted in unmeritorious pension claims and lack of consistency in decision-making.

¹ *Re Drake and Minister for Immigration and Ethnic Affairs* (No 2) (1979) 2 ALD 634, 645.

² Justice von Doussa, 'Natural Justice in Federal Administrative Law', paper presented at a seminar by the Australian Institute of Administrative Law, Darwin, 7 July 2000, 3.

³ Inserted by the *Veterans Affairs (1994-95 Budget Measures) Legislation Amendment Act 1995*.

5.6 Impetus was afforded for the amendments to the VEA by the decision of the High Court in *Bushell v Repatriation Commission* where in considering what medical-scientific evidence would support a reasonable hypothesis connecting a veteran's medical condition with service, Mason CJ, Deane and McHugh JJ said inter alia:

...the case must be rare where it can be said that a hypothesis, based on the raised facts, is unreasonable when it is put forward by a medical practitioner who is eminent in the relevant field of knowledge. Conflict with other medical opinions is not sufficient to reject a hypothesis as unreasonable...But it is vital that the Commission keep in mind that that hypothesis may still be reasonable although it is unproved and opposed to the weight of informed opinion.⁴

5.7 In an Audit Report handed down in 1992 by the Australian National Audit Office, it was observed that the approach adopted in *Bushell* would lead to 'the great majority of claims being accepted.'⁵ The Audit Report recommended a review of the compensation scheme for veterans and their dependents. This review was subsequently undertaken by the Veteran's Compensation Review Committee chaired by Peter Baume.

5.8 In its 1994 report, *A Fair Go, Report on Compensation for Veterans and War Widows*, the Committee recommended, amongst other things, that:

An independent, Expert Medical Committee be established to resolve general medical issues and to formulate Statements of Principle for application to all decision-making.⁶

5.9 The Repatriation Medical Authority (the RMA) had its origins in this recommendation. It was proposed in the report that the Statements of Principle would have legislative authority, would guide the process of determining whether an injury was 'predominantly war caused' and would ensure consistent standards in decision-making.⁷

5.10 Following this report, in 1994, substantial amendments to the Veterans' Entitlements Act were presented to Parliament, including the inclusion of Parts XIA and XIB.⁸ In the explanatory memorandum to the legislation⁹ it was stated that in providing for the establishment of the RMA, the intention

⁴ (1992) 175 CLR, 414-415.

⁵ Australian National Audit Office, *Audit Report 1992*, 1992, paragraph 1.1.10.

⁶ The Honourable Emeritus Professor Peter Baume AO, *A Fair Go, Report on Compensation for Veterans and War Widows*, 1994, paragraph 3.9.

⁷ *Ibid*, paragraphs 3.7 and 5.6.20.

⁸ For a comprehensive record and analysis of these amendments, see Robin Creyke and Peter Sutherland, *Veterans' Entitlements Law*, 2000, pp 521 - 524.

⁹ *The Veterans' Affairs (1994-5 Budget Measures) Legislation Amendment Act 1994*.

of the new Part XIA was to 'ensure a more equitable and consistent system of determining claims for disability pensions for veterans and their dependents'.

5.11 The role of the RMA is to determine Statements of Principles (SoPs) with respect to injury, disease or death if it is of the view that sound medical-scientific evidence exists indicating a link eligible Australian Defence Force service. The SoP system is founded on the basis that a connection between service and medical condition should be supported by established epidemiological evidence accepted by the RMA, rather than by the expert medical evidence produced in an individual application for pension.¹⁰

5.12 Pursuant to an undertaking given by the Government of the day at the time of the passage of the 1994 legislation, and reiterated by the successor to that Government, a review was subsequently undertaken of the RMA and the SMRC. In the Report of the Review Committee¹¹ it was said of the SOP system that:

It provides a degree of certainty that is otherwise absent. It provides a clear direction to claimants or their representatives as to the evidence that must be gathered for the purpose of making a claim.

It overcomes the need to search for supporting medical opinion. It reduces the range of matters that are open to be appealed which is overall beneficial not only in the public interest but in the interest of individuals.¹²

5.13 Indeed, the success of the Statement of Principles Scheme has been such that it is used as a reference framework in other compensation jurisdictions including in some overseas veterans administrations.

The migration experience

5.14 Consistency and predicability have also been important factors in the migration area. In relation to that legislation, there has been a particular focus on uncertainties arising from the open-ended nature of the grounds of review. In his second reading speech to the *Migration Reform Act 1992*, the then Immigration Minister, the Hon Gerry Hand, stated that 'the Government wishes to make the application of the legal concepts of migration decision-making predictable'.

¹⁰ Part XIB was inserted during debate on the Bill in the Senate to provide a means of appeal from determinations of the RMA to a body titled the Specialist Medical Review Council. For further information in relation to this body see Robin Creyke and Peter Sutherland, *Veterans' Entitlements Law*, 2000, pp 531 - 536.

¹¹ Emeritus Professor Dennis Pearce was appointed to conduct the review. He was assisted by Professor D'Arcy Holman who provided a technical report relating to the work of the RMA: D Pearce, D Holman, *Report of the Review Committee, Part Two*, 1997.

¹² *Ibid*, p 524.

5.15 More recently, in his second reading speech to the *Migration Legislation Amendment (Procedural Fairness) Bill 2002*, the Minister for Immigration and Multicultural and Indigenous Affairs, the Hon Philip Ruddock MP, noted that one of the reasons for the inclusion in the Migration Act by the *Migration Reform Act 1992* of the code of procedural fairness was to:

...replace the uncertain common law requirements of the natural justice 'hearing rule', in particular, which had previously applied to decision-makers.¹³

5.16 The Minister noted that the Bill, made it expressly clear that codes in the Migration Act 'do exhaustively state the requirements of the natural justice or procedural fairness hearing rule'.¹⁴ This represented a response to the decision of the High Court in *Miah*,¹⁵ where it was found that the code of procedure relating to visa applications had not clearly and explicitly excluded common law natural justice requirements.

5.17 As a result of the decision in *Miah*¹⁶, even where the code was followed in every respect there could still be 'uncertainty about the legal procedures which decision-makers are required to follow to make a lawful decision'.

5.18 Such developments are consistent with moves generally encouraged by the Productivity Commission for the development of performance indicators which are specific, clear and easily applied. This is seen as an aid to better decision-making across public administration.¹⁷

Discussion point 8

5.19 The foregoing discussion notwithstanding, the view may be taken that arguments for legislative limitation of judicial review on the basis of considerations of consistency and predicability in decision-making will not always be convincing.

5.20 As noted by Brennan J in *Re Drake and Minister for Immigration and Ethnic Affairs*, 'consistency is not preferable to justice'.¹⁸ It might also be said that consistency is not necessarily synonymous with justice. In some instances, the desire for consistency and predicability can override

¹³ Second Reading Speech, *Hansard*, 13 March 2002, 1106.

¹⁴ *Id.*

¹⁵ *Minister for Immigration and Multicultural Affairs: Ex parte Miah* (2001) 206 CLR 57.

¹⁶ *Id.*

¹⁷ See further Professor M Neave, 'In the Eye of the Beholder - Measuring Administrative Justice', in R Creyke and J McMillan, *Administrative Justice - the Core and the Fringe*, 1999, p 124 and L McDonald, 'Measuring Administrative Justice - Lessons from the Report on Government Services', in R Creyke and J McMillan, *Administrative Justice - the Core and the Fringe*, 1999, p 138.

¹⁸ (No 2) (1979) 2 ALD 634, 645.

consideration of the implications of a decision in a particular case, and lead to decisions that are unjust.

5.21 Where practical technical expertise resides in a primary decision-making body, claims for legislative limitations on judicial review may have some basis. Indeed, in some situations, 'review inhibitors' such as those utilised in the veterans' affairs area, may be thought to present an acceptable 'limiting and limited' solution both in the context of merits and judicial review especially in high volume cases.

5.22 As noted, establishment of the Veterans' Affairs SoP system has been concluded to be in the public interest.¹⁹ In so far as the SoPs relate to technical medical issues and their epidemiological connection with events of service, often many years previously, however, they do not represent the usual evidentiary issues associated with administrative decision-making.

5.23 Nevertheless, the fact that consistency and predicability are values underlying judicial review should not be overlooked. Courts have an important part to play in maintaining consistency in the interpretation of legislative provisions, particularly new provisions, and in the development of precedent.

5.24 In the face of inconsistency and unpredictability, the cost of judicial review both to government and the individual may also be a factor for consideration. This is explored in more detail below.

Do you agree/not agree with these views?

Are there other relevant considerations?

Please elaborate.

Abuse of review process

5.25 In recent times, government has tended to place particular focus on 'abuse' as a reason for limiting judicial review. However, what constitutes 'abuse' may be difficult to identify.

5.26 In his second reading speech to the *Jurisdiction of Courts Legislation Amendment Act 2000*, the Attorney-General said:

¹⁹ D Pearce, D Holman, *Report of the Review Committee, Part Two*, 1997.

The object is to avoid the use of unmeritorious delaying tactics in the criminal justice process by removing the collateral access of defendants to federal administrative law procedures and remedies.²⁰

5.27 There were also references in the debate of this legislation to the effect that:

Collateral attacks [lack] merits and are invariably only used by defendants with deep pockets.²¹

5.28 In the migration area, it has been remarked by the Minister for Immigration and Multicultural Affairs, the Hon Philip Ruddock MP, that:

...litigation can be an end in itself. Given the importance attached to permanent residence in Australia, there is a high incentive for refused applicants to delay removal from Australia as long as possible. This may be done to give time for them to establish ties within the community which they may hope will yield entitlement to a visa through another pathway. The incentive to delay removal from Australia is increased if the refused applicants are enjoying privileges such as work rights and access to Medicare.²²

5.29 Further:

One of the difficulties that we experience in this area – I think the only other area that has been likened to it is the area in relation to tax decisions – is that generally speaking when people access judicial review or administrative review they do not achieve their immediate outcome.

...what if your principal intention is to enter Australia and work here temporarily – in other words, if people are seeking access to Australia merely as a guest worker? I have to say the people who lodge asylum claims or who use the appeal system are very often people whose principal intention is to be a guest worker, who has permission to work. ...if they can delay determination of decisions in relation to their status they can achieve what is in fact their principal objective – the objective of being here and being able to work for a period of time.²³

5.30 Again in the migration area, one of the arguments used to support passage of the *Migration Legislation Amendment Act (No 2) 2001*, limiting class actions in the migration jurisdiction, was said to be 'to combat the recent

²⁰ The Daryl Williams, Attorney-General, Second Reading Speech, Jurisdiction of Courts Legislation Amendment Bill 2000, *Hansard*, 8 March 2000.

²¹ Australia, House of Representatives, *Debates*, 14109.

²² The Hon Philip Ruddock, Minister for Immigration and Multicultural Affairs, Second Reading Speech, *Migration Legislation Amendment Bill (No 4) 1997*, *Hansard*, 25 June 1997.

²³ *Id.*

increase in the use of class actions...for people with no lawful authority to remain in Australia to prolong their stay and frustrate removal action'.²⁴

5.31 As suggested elsewhere in this paper, similar concerns could well have been at the root of the limitations on judicial review existing in relation to the review of income tax assessments.

Previous Council consideration

5.32 In 1986, in its 26th report, *Review of the Administrative Decisions (Judicial Review) Act 1977 – Stage One*, the Council concluded that:

...it is generally only correct to describe as abuses of the Act those proceedings which are designed to delay or frustrate Commonwealth administration (in a broad sense) merely in order to gain a tactical advantage rather than to establish a genuine legal right or interest.²⁵

5.33 In saying this, the Council did not consider the existence of alternative remedies in the face of high volumes of applications for judicial review to be indicative, in themselves, of abuse of the administrative system.

5.34 The Council noted further that abuse is not evidenced 'by the mere fact that an application for an order of review has been refused'. The Council noted in this regard that 'even unsuccessful proceedings under the Act 'may involve real questions, whether of fact or law or both, which justifiably require adjudication and determination by a court in relation to which it is reasonable to make an application under the Act.'²⁶

5.35 The Council also considered that the fact that proceedings under the AD(JR) Act may have the consequence of delaying other proceedings already in train does not, in itself, indicate an abuse of process.

5.36 In *Review of the Administrative Decisions (Judicial Review) Act 1977 – Stage One*, while noting that:

It would be highly undesirable if the Act were being used unduly to frustrate or impede legitimate administrative action in an attempt to obtain mere tactical advantage...²⁷

the Council concluded that 'many of the allegations about 'abuses' had been exaggerated'.²⁸

²⁴ The Hon Phillip Ruddock, Minister for Immigration and Multicultural Affairs, Second Reading Speech, *Migration Legislation Amendment Bill (No 2) 1999* [2000], *Hansard*, 14 March 2000.

²⁵ Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act 1977 – Stage One*, Report No 26, 1986, paragraph 38.

²⁶ *Ibid*, paragraph 8.

²⁷ *Ibid*, paragraph 3.

5.37 Although it found little evidence of such abuse, the Council considered that the possibility of using the AD(JR) Act for the purpose of delay existed in relation to the ongoing proceedings of tribunals such as the Australian Broadcasting Tribunal and in an area such as taxation. However, in the end result, the Council recommended amendment to the Act to extend and clarify the Federal Court's power to stay, or to refuse to grant an application under the AD(JR) Act as the mechanism to control abuse of power.²⁹

5.38 The Council's findings were subsequently endorsed by the Senate Legal and Constitutional Affairs Committee in its consideration of the 1986 Administrative Decisions (Judicial Review) Amendment Bill 1986.³⁰

5.39 The Committee also acknowledged the view of the NSW Law Society that there was:

...great difficulty in appreciating the justification for penalising individuals who are genuinely aggrieved by Commonwealth administrative action by making it more difficult and expensive for them to bring review proceedings because of perceived abuse of the AD(JR) Act ... in circumstances which are unlikely to recur. The injustice is compound[ed] by the fact that individuals or corporations with vast resources [will still be able to use other methods of judicial review].³¹

Discussion point 9

5.40 Having regard to the preceding discussion it would seem that identification of 'abuse' remains difficult and subjective. For instance, in relation to the *Jurisdiction of Courts Legislation Amendment Act 2000*, the Government used no statistics or examples to back up its claims that judicial review was being used in collateral attacks on the criminal justice process.³²

5.41 Obviously, identification of what constitutes an abuse of process is not necessarily reflected in the number of applications for review or in the numbers of successful (or unsuccessful) applications.

²⁸ Ibid, paragraph 9.

²⁹ Ibid, paragraphs 38-48.

³⁰ Senate Standing Committee on Legal and Constitutional Affairs, *Administrative Decisions (Judicial Review) Bill 1987*, *Parliamentary Paper No 212*, 1987.

³¹ Ibid, paragraph 3.41.

³² See comments in the Bills Digest to the *Jurisdiction of Courts Legislation Amendment Act 2000*, *Bills Digest No 149*, 1999-2000, p 15 which can be found on the Department of the Parliamentary Library at <http://www.aph.gov.au/library/pubs/bd/1999-2000-2000BD149.htm>; and Sean Brennan, 'Judicial Review and the Pre-trial Process' (2000) *AIAL Forum* No 26 33, 41.

5.42 Similarly, high withdrawal rates for applications might be indicative of a desire to ensure that time limits for applications are met rather than a desire to abuse the system.

5.43 In some areas, tax and migration for instance, it may be that there are time-advantages in lodging an application for judicial review. Moreover, as stated elsewhere in this paper, the constitutional separation of powers principle makes judicial review imperative in relation to certain issues.

5.44 Undoubtedly, although there are circumstances where some people may be attempting to delay or frustrate administrative processes, there are others where they are not. In such circumstances, applicants may be resorting to judicial review because they genuinely believe that they have a grievance – that they were not afforded procedural fairness or that there was a substantive error of law made in their case, which is best dealt with by the courts.

5.45 Accordingly, the view may be taken that ‘abuse’ should not readily be relied on by government as a reason for limiting review in a particular area. By virtue of the methods they employ and their necessary focus on the case at hand, arguably, courts are better placed to identify ‘abuses’ in particular cases.

5.46 If such ‘abuse’ is presented in the form of high volumes of cases and related strains on financial and human resources, it may be something which government should respond to.

5.47 In view, however, of the fact that many applications may well be ‘genuine’, it is suggested that if it decides to limit judicial review on this basis, it is incumbent that there be an adequate alternative to judicial review.

Do you agree/not agree with these views?

Are there any other relevant considerations?

Please elaborate.

Resource-related issues

The executive perspective

5.48 Resource-related issues cover both financial cost and cost in terms of the use of personnel, time and other resources. Concerns as to resources are

often inextricably linked to claims of abuse of process and may also frequently underlie concerns as to consistency and predicability.

5.49 Concern in this area has tended to focus on the cost to government and, through government, to the public in general rather than to the individual. Overall however, a balance must be achieved between:

...on the one hand, the need to provide individuals with a means by which they may effectively obtain judicial review of the legality of administrative action and, on the other hand, the need to rationalise and ensure the proper use of existing review mechanisms, to keep costs to a minimum and to protect public authorities from unwarranted legal action.³³

5.50 At a 1987 administrative law seminar, the then Minister for Finance, Senator Walsh, commented that the Australian system of administrative law is based upon the belief that 'perfect legislation backed up by a legal system can deliver a perfect world' and that this:

...implicitly assumes a world of unlimited resources in which the cost of sustaining the 'perfect' legal system need not be, or even should not be, taken into account.³⁴

5.51 The Minister also observed that 'equity is provided for those who feel aggrieved by decisions' but at considerable cost to taxpayers who must pay for much more complex and cumbersome administrative procedures than would otherwise be the case'.³⁵

5.52 Resource-related issues were a factor alluded to by the current Attorney-General in the context of the *Jurisdiction of Courts Legislation Amendment Bill 2000*:

...without reducing fairness or access to justice, the expectation is that the transfer of jurisdiction [from the Federal Court] will contribute to increased efficiency, and reduction of costly delays which may otherwise result from access to court systems. ³⁶

5.53 Such considerations also featured in the shaping of the review regime provided for in the *Public Service Act 1999*. In a paper preceding the development of the scheme, it was noted that:

³³ Submission of the Attorney-General's Department to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the *Administrative Decisions (Judicial Review) Amendment Bill 1987*, *Parliamentary Paper No 212*, 1987, 26.

³⁴ Minister for Finance, Senator Walsh, Address to Seminar on *Administrative Law - Retrospect and Prospect* at the Australian National University, Canberra, 15 March 1987, 3.

³⁵ *Ibid*, at 5.

³⁶ The Hon Daryl Williams MP, Attorney-General, Second Reading Speech, *Jurisdiction of Courts Legislation Amendment Bill 2000*, *Hansard*, 8 March 2000.

At present there are too many avenues of appeal, resulting in complicated and convoluted processes. The responsibility to afford public servants a right of review of employment decisions needs to be balanced against the need to reduce the costs associated with an appeals culture.³⁷

5.54 In relation to migration decisions, resource concerns have attracted bipartisan support. In a submission to the Senate Legal and Constitutional Legislation Committee in its consideration of the *Migration Legislation Amendment (Judicial Review) Bill 1998*, former Immigration Minister, Mr Gerry Hand, said that:

Throughout my time as Minister...I was concerned with the amount of public resources consumed in judicial review processes which ultimately did not alter the situation that the person was not entitled to remain in Australia. These resources not only included the costs to the Department. They also included the use of [scarce] legal aid funds on persons with no link to Australia when Australian citizens and permanent residents were being denied legal aid for legitimate grievances.³⁸

5.55 In the Explanatory Memorandum to the *Migration Amendment (Judicial Review) Bill 2001*, it is observed that, if they were to operate as predicted, the amendments effected by the Bill to the Migration Act would, 'by reducing the issues to be addressed and allowing cases to be resolved more quickly, *deliver substantial savings.*' [emphasis added]

5.56 In providing evidence in support of the earlier version of this legislation, the *Migration Legislation (Judicial Review) Bill 1998*, the Department provided evidence that the reforms were expected to deliver significant savings of up to 50% in the Department's legal costs, once the backlog and initial challenges to the privative clause were dealt with.

The judicial perspective

5.57 Although the evaluation of resource issues is a matter of particular concern to the executive, the courts have not been oblivious to the pressures on primary decision-makers to deal with large numbers of cases with the attendant costs that that involves. Judicial consideration of such issues arises, inevitably, however, in the context of individual hearings, particularly in the context of the ground of procedural fairness.

³⁷The Public Service Merit Protection and the Department of Employment, Workplace Relations and Small Business, 'Accountability in a Devolved Management Framework', May 1997.

³⁸ Submission of Mr Gerry Hand to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the *Administrative Decisions (Judicial Review) Amendment Bill 1987*, *Parliamentary Paper No 212*, 1987, 4.

5.58 As discussed earlier, the nature and extent of cost considerations is not generally amenable to assessment on a case by case basis. In one case, however, the High Court was prepared, having regard to the size of the administration and the volume of decision-making, to relax the requirement that decisions should be made by statutory office holders.³⁹ In another case, in concluding that there was no universal mandate for an oral hearing by the delegate, the Federal Court had regard to the practical implications of the prescription of particular procedures:

The court has no direct knowledge of the resource implications of particular procedures, nor of the resources available to the Department to implement them. Oral hearings by the ultimate decision-makers could be provided for all applicants using the simple artifice of increasing the number of person with appropriate delegations. However, it may be...such a solution would also put the final decision-making responsibility in the hands of more junior and less experienced officers than those who currently hold delegations. In my opinion, courts should be reluctant to impose in the name of procedural fairness detailed rules of practice, particularly in the area of high volume decision-making involving significant use of public resources.⁴⁰

5.59 There are limits however to the extent to which such considerations can supplant considerations going to the substance and quality of the decision-making process.

5.60 While Kirby P in *Johns v Release on Licence Board*⁴¹ looked at the financial costs involved in increasing the content of the hearing rule for the Release on Licence Board, he noted that practical issues, such as the staff shortages and accommodation, should not be factors limiting the requirements of procedural fairness.

5.61 Although noting the intention of the Code under the Migration Act to assist delegates in the efficient and speedy resolution of the thousands of visa applications with which they must deal each year, Kirby J in *Minister for Immigration and Multicultural Affairs: Ex parte Miah*,⁴² for example, was not prepared to construe the Act so as to exclude the rules of procedural fairness. In such circumstances, courts are bound to have regard to the rights of the individual rather than broad-based issues of financial policy.

³⁹ *O'Reilly v Commissioner of State Bank of Victoria* (1983) 153 CLR 1.

⁴⁰ *Zhang De Yong v Minister for Immigration, Local Government and Ethnic Affairs* (1997) 151 ALR 515, 551 per Wilcox J.

⁴¹ (1987) 9 NSWLR 103.

⁴² (2001) 206 CLR 57, [178].

Previous Council consideration

5.62 In commenting on the volume of applications, in its first report in 1977, *Administrative Decisions (Judicial Review) Act 1977, Exclusions under Section 19-1978*, the Council responded to claims by some agencies that the AD(JR) Act would lead to an opening of the 'flood-gates' for review by noting that if there was a dramatic increase in the number of review applications an exclusion of that area could be made quickly.

5.63 The Council also noted that a high volume of litigation might be seen as evidence that the Act was having a 'salutary effect in checking the lawfulness which may not otherwise be exposed.'

5.64 In some areas, the Council noted that new legislation could raise difficult questions for decision, resulting in an upsurge in the number of AD(JR) Act challenges. The Council noted that this was followed frequently by a slackening off once the Federal Court's approach to the legislation begins to emerge.⁴³

Discussion point 10

5.65 Undoubtedly, resource considerations are a legitimate concern of government and as such, may have an important impact on the desirable scope of judicial review.

5.66 It seems apparent, moreover, that the executive is best placed to assess the level of resources it can allocate to a particular area of government decision-making. In contrast, judges are not in a position to determine where resources should be provided or how they should be apportioned. Such decisions involve a range of issues and of knowledge.

5.67 In this sense, such issues are polycentric,⁴⁴ involving consideration of matters of which a court is unlikely to have knowledge or to be equipped to act upon if it did. As the role of a court is to examine cases on an individual basis, it would seem generally inappropriate for it to involve itself in such broad-based considerations.

Contributing factors and responses

5.68 What has emerged from this discussion and discussion of the related issue of abuse of process is that there is a range of factors which may contribute to high review costs in particular areas.

⁴³ Administrative Review Council, *Administrative Decisions (Judicial Review) Act 1977, Exclusions under Section 19*, Report No. 1, 1978, paragraph 8.

⁴⁴ See discussion of this concept in Section II of this paper.

5.69 In the Council's view, there are a number of ways that such concerns could be responded to other than through a reduction of judicial review rights.

New legislation

5.70 As noted by the Council in its first report,⁴⁵ the passage of new legislation or amendments to existing legislation may encourage an initial 'rash' of cases 'testing out the waters'. This will undoubtedly lessen as the parameters of the new or amending legislation are established and training and procedures are put in place.

5.71 In such circumstances, it may be considered that the courts have an important interpretative role to play and a role in achieving the consistency of approach referred to in the preceding section: only a court can offer a final and authoritative interpretation of a piece of legislation. Attempts to reduce litigation by legislative means may be regarded as both unnecessary and inappropriate.

Referral of cases by the court

5.72 Failure of the Federal Court in many instances to make adequate use of its discretionary power under paragraph 10(2)(b)(ii) of the AD(JR) Act to refuse an application where other 'adequate' avenues of review exist can, for instance, place pressures on the system.⁴⁶

Standards of primary decision-making

5.73 Poor quality decision-making may also, of course, encourage applicants to circumvent internal or tribunal review procedures in favour of judicial review. Again, the answer is clearly not to limit the scope of judicial review, but to address decision-making problems at agency and tribunal levels.

5.74 In some cases, strategies might be needed to improve the standard of primary decision-making. In other areas, extended and improved alternative review mechanisms might need to be developed.

Adequate alternatives

5.75 Where adequate alternative remedies are not in place, they might need to be established. Where such remedies are in place, the courts might need to be encouraged to refer cases to them. In some cases, a combination of all or some of these options might apply.

⁴⁵ *Administrative Decisions (Judicial Review) Act 1977, Exclusions under Section 19*, Report No. 1, 1978.

⁴⁶ Statistics are not available from the Federal Court in relation to numbers of cases referred by the Court under section 10(2)(b)(ii) of the AD(JR) Act.

5.76 Where an 'adequate' alternative review structure is provided, it is arguable that legislative limits on judicial review are justified. However, where the provision of adequate alternative remedies is accompanied by active referral by the courts of appropriate cases to the alternative system, then it is equally arguable that legislative limitation of judicial review is unnecessary.

5.77 In the context of adequate alternative remedies however, one of the features of the constitutional separation of powers doctrine is that tribunals can not make final binding and authoritative decisions. While this system prevails, use of the courts for judicial review is inevitable (and of discernible value).

Access to legal aid/ avoidance of undesirable consequences

5.78 Other factors contributing to large volumes of judicial review cases might include easy access to legal aid as in the veterans' entitlements area, or the desire to exploit the legal process to avoid an undesirable consequence, such as deportation, in the migration or criminal areas.

5.79 The first of these examples, high levels of legal aid, is an issue which the government is best placed to address, though not, it is submitted, through limitations on the scope of judicial review.

5.80 Response to the second example might include seeking to reduce the open-textured nature of some legislative decision-making provisions and (with greater difficulty), international conventions.

5.81 Relevantly, in the taxation area where there might also be advantage in delay, measures have been taken legislatively to replace the judicial review regime with a comprehensive tiered review scheme capped ultimately, in most cases, with a right of appeal.

5.82 If the conclusion is reached that there is no other way to bring costs into line than by imposing restrictions on judicial review, in addressing the issue, the preferable approach may be for parliament to use a fine-tuned legislative instrument, for example, by specifically identifying which decisions are reviewable.

5.83 If it is possible to retain some elements of review having regard to the potential of some grounds of review to attract greater cost responses than others,⁴⁷ then, arguably, this distinction should be made. In any event, to maintain government accountability and to ensure the protection of individual rights, judicial review should only be replaced if there is an

⁴⁷ Full compliance with the rules relating to the right to be heard is a case in point. As noted earlier in the discussion paper.

adequate alternative review mechanism: the rights of the individual applicant should not be manifestly reduced. Consideration later in the discussion paper with regard to adequate alternative remedies is relevant in this regard.

Do you agree/not agree with these views?

Are there other relevant considerations?

Please elaborate.

SECTION III

The nature of the decision

Policy and policy decisions

5.84 Policy has been described as ‘the process by which governments translate their political vision into programs and actions to deliver “outcomes” – the desired outcomes in the real world.’⁴⁸ Such policy, often referred to as ‘government policy’, may be expressed, though not always, by way of government or ministerial statement, and has an expansive rather than a limited application.⁴⁹

5.85 At another level, policy may be employed as a rule or guide for deciding when and what action may or may not be taken in the exercise of a statutory discretion.⁵⁰ This sort of policy may take a variety of forms – from official departmental publications providing statements of objectives to detailed guidelines or instructions to unofficial expressions of opinion by public servants. In the absence of any such statement or policy, a course of action may also be developed and followed over a period of time. Many such “policies” do not have ministerial or government endorsement, may not be readily categorised in terms of broad-based government policy and may amount to little more than statements of objective, or opinions offered by individual agency officials as to what legislation means.⁵¹

⁴⁸ United Kingdom Prime Minister and Minister for Cabinet Office, ‘White Paper’, *Modernising Government*, presented to the English Parliament in March 1999.

⁴⁹ *Leppington Pastoral v Department of Administrative Services* (1990) 94 ALR 67, 76. In this case, the Full Court contrasted the statement that X’s property was required for use as an airport pursuant to a government policy of acquiring X’s property for an airport, with a statement referring to a policy that there should be a second airport in the Sydney region. Although the latter could be regarded as a policy statement, the former, according to the court, could not.

⁵⁰ Dennis O’Brien, ‘Tribunals and Public Policy. What Decisions are Suitable for Review?’ (April 1989) 58 *Canberra Bulletin of Public Administration* 86.

⁵¹ John McMillan, ‘Review of Government Policy by Administrative Tribunals’ *Law and Policy Paper No 9*, Centre for International and Public Law 1998, 33, 34.

The importance of policy in government decision-making

5.86 Development of government policy is commonly regarded as a function of government 'for which it is publicly and politically accountable, and an elected government can rightfully expect that its policies will be carried into effect by the executive arm of government'.⁵²

5.87 The importance attached by the government to the awareness and responsiveness of administrators to government policy is reflected in the Australian Public Service Values set out in the *Public Service Act 1999*, which require that:

the APS [be] responsive to the Government in providing frank, honest, comprehensive, accurate and timely advice and in implementing the Government's policies and programs.⁵³

5.88 The prominence afforded to policy is also reflected in the imposition on directors of statutory authorities and government companies by the *Commonwealth Authorities and Companies Act 1997* of an obligation to ensure that any 'general policies of the Commonwealth Government' notified in writing by a Minister to the directors 'are carried out' in relation to' the authority or company.⁵⁴

5.89 A number of other Commonwealth statutes also encourage administrative regard to government policy, some providing for Ministerial direction where in the performance of its functions and the exercise of its powers, a body is 'in conflict with major government policies'.⁵⁵ Other legislation requires compliance with policies of the Commonwealth Government of which written notice is given.⁵⁶

5.90 Under section 78AB of the *Income Tax Assessment Act 1936*, in considering whether to give a direction for the registration of a certified body on the Register of Environmental Organisations, the Environment Minister and the Treasurer are 'required to take into account 'the policies and budgetary priorities of the Commonwealth Government'. Similarly, in making a decision under Division 396 (Land Transport Facilities Borrowing), the Minister for Transport and Regional Development is to take account of, amongst other things, 'the extent to which the project conforms to Commonwealth and State government policies and planning requirements'.⁵⁷

⁵² Ibid, 33.

⁵³ Set out in section 10 of the *Public Service Act 1999*, paragraph 10(1)(f) of that Act

⁵⁴ Sections 28, 43 of the *Commonwealth and Companies Act 1997*.

⁵⁵ See for example, *Australian Tourist Commission Act 1987* section 29(1), *Dairy Produce Act 1986* section 8(1), *Fisheries Administration Act 1991* section 91(1).

⁵⁶ See for instance section 11 of the *Australian Research Council Act 2001*.

⁵⁷ Sections 396 - 75, *Income Tax Assessment Act 1936*.

5.91 The way in which they handle policy in their decision-making processes represents a fundamental distinction between primary decision-makers, tribunals and courts. Policy is often an integral part of administrative decision-making. It may mean that a decision is correct notwithstanding a mistake of fact or an apprehension of the possibility of a fact existing. Even though not included in a statute or regulation, it may dictate what is material in a particular case. It may also reverse the onus of proof for example.⁵⁸

Policy decisions

5.92 Most administrative decisions will have at their root some policy pronouncement of government. Such elements usually overlap with other matters such as the view taken by the decision-maker of the law or upon factual matters or the conduct of the decision-maker vis à vis the applicant.

In practice it would be extremely difficult for the courts to isolate and to ignore policy elements whilst otherwise examining decisions for substantive unfairness and unreasonableness.⁵⁹

5.93 There are some decisions, however, where policy is a critical element, either because there is no pre-existing policy, or where the subject matter of the decision is, in itself, reflective of high government policy. Some decisions, such as those relating to international relations and national security may, by virtue of their nature, be considered to relate to higher policy issues than others.⁶⁰

Exceptions to judicial review of certain sorts of policy decisions

5.94 In the reports of both the Kerr⁶¹ and Ellicott⁶² Committees, exceptions to the jurisdiction of the proposed Administrative Court were contemplated. Both committees recommended that policy decisions of government ministers be excluded from judicial review,⁶³ the Ellicott Committee observing that:

There may...be some discretions exercised by Ministers which ought not be subjected to a general system of judicial review because their policy content or other special reasons make this undesirable in the public interest. In some cases it will be found that procedures for review and perhaps judicial review, are already available. Discretions which, in our view, might be excluded would include some relating to defence,

⁵⁸ See Justice Brennan, 'The Purpose and Scope of Judicial Review' (1986) 2 *Australian Bar Review* 93, 95.

⁵⁹ Murray Wilcox, 'Judicial Review and Public Policy' (April 1989) 58 *Canberra Bulletin of Public Administration* 70, 71.

⁶⁰ Although, as noted in the discussion of justiciability, the nature of the particular decision rather than of the broad subject area is a more accurate gauge of reviewability.

⁶¹ The Kerr Committee report, 1971.

⁶² The Ellicott Committee report, 1973.

⁶³ The Kerr Committee report, paragraph 265; The Ellicott Committee report, 1973, paragraph 2.7.

national security, relations with other countries, criminal investigation, the administration of justice and the public service.⁶⁴

5.95 The limitations referred to by the Committee appear to reflect those formerly associated with the exercise of prerogative power and more recently, with court consideration of whether or not a matter before it is justiciable, that is to say, whether or not it is a matter upon which the court can, or considers it appropriate that it should adjudicate.

5.96 The words of Brennan J of the United States Supreme Court in the decision of *Baker v Carr* are pertinent in this regard:

...the courts are not fit instruments of decisions where what is essentially at stake is the composition of those large contests of policy traditionally fought out in non-judicial forums, by which governments and the actions of governments are made and unmade.⁶⁵

5.97 In summary, such decisions commonly include:

- decisions relating to foreign affairs⁶⁶ (such as a decision to implement⁶⁷ or to enter into a treaty)⁶⁸
- decisions relating to national security
- decisions to prosecute or not to prosecute
- decisions relating to granting pardons to convicted persons;⁶⁹ and
- decisions to appoint judicial officers.⁷⁰

⁶⁴ Ibid, the Ellicott Committee report, at paragraph 26. A similar approach was adopted by the Committee in relation to public servants, authorities and tribunals at paragraph 30.

⁶⁵ *Baker v Carr* 369 US 186 (1962), quoted by McTiernan J (dissenting) in *Victoria v Commonwealth* (1975) 134 CLR 81, 135.

⁶⁶ In *Thorpe v Commonwealth of Australia (No 3)* (1997) 144 ALR 677, 690 Kirby J stated:

...the issues presented by the declarations lacked "judicially discoverable and manageable standards for resolving" a justiciable issue. Traditionally in this country, as under like constitutional provisions in the United States, the courts have been extremely reluctant to pass upon the conduct of international relations.

⁶⁷ *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 75 ALR 218.

⁶⁸ *Koowarta v Bjelke Petersen* (1982) 153 CLR 168, 229.

⁶⁹ It might be noted however that in the British decision, *R v Secretary of State for the Home Department; ex parte Bentley* [1993] 4 All ER 442, it was held that the Secretary's decision not to recommend the granting of a posthumous pardon was susceptible to judicial review.

⁷⁰ For example, in *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 18, a case concerning the exercise of a statutory power to appoint magistrates, Mason J pointed out that the court is reluctant to intervene in the judiciary's traditional role of appointing judicial officers.

5.98 In its 1999 publication *What Decisions Should be Subject to Merits Review?* the Council also added to this grouping decisions affecting the Australian economy. Included in this category were decisions of such fundamental significance as determining interest rates; floating the dollar; allocation of money to one program over another; and, setting foreign exchange rates. However, it was considered that a decision of a Minister to approve a body corporate as a stock exchange may not be of sufficiently high political content to warrant exclusion from judicial review.⁷¹

5.99 Similarly with decisions in relation to matters of defence. In 1989 in its 32nd report, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act*, the Council took the view that though they might well be susceptible to review under the AD(JR) Act, decisions deriving from the command power in section 7 of the *Defence Act 1908* might well not be justiciable.

5.100 It has been said that the underlying rationale for the exemption from review of decisions in these areas rests with essentially practical considerations, such as the importance of speaking with a single voice in relation to matters of international relations,⁷² and in achieving finality and immediate obedience in relation to the declaration or cessation of war or the deployment of forces.⁷³

5.101 Under Schedule I to the AD(JR) Act there are also exclusions from review of a range of legislation coming broadly within these subject groupings.

5.102 Policy may also be political in the sense of being controversial: however, as observed by Kirby J:

...the mere involvement of a political or controversial question does not mean that a court lacks jurisdiction, that a controversy is not a 'matter' for the purpose of the Constitution, that a cause of action lacks viability or that the issue tendered is non-justiciable.⁷⁴

5.103 A distinction may also be drawn between a decision that is 'essentially political' and one that is 'policy driven'.⁷⁵

⁷¹ Administrative Review Council, *What Decisions Should be Subject to Merits Review?* 1999, paragraphs 4.2, 4.23 and 4.24.

⁷² See comments per Brennan J of the US Supreme Court in delivering the judgment of the court in *Baker v Carr* (1961) 369 USR 186, 213.

⁷³ *Ibid*, quoting *Martin v Mott*, 12 Wheat, 19, 30.

⁷⁴ *Thorpe v Commonwealth of Australia (No 3)* (1997) 144 ALR 677, 692 per Kirby J.

⁷⁵ Sir Anthony Mason AC KBE, 'Lecture 2 Scope of Judicial Review' (November 2001) *AIAL Forum* No 31 21, 24 - 25.

5.104 As also noted by Dixon J at a somewhat earlier date, noting that exemptions for policy can be overstated:

The Constitution is a political instrument. It deals with government and governmental powers. The statement is, therefore, easy to make though it has special plausibility. But it is really meaningless. It is not a question whether the considerations are political, for nearly every consideration arising from the Constitution can be so described.⁷⁶

Exceptions to the exemption

5.105 The decision in *R v Secretary of State for the Home Department, ex parte Bentley*,⁷⁷ is authority for the proposition that the courts cannot simply be ousted by the high policy nature of a decision:

The question is simply whether the nature and subject matter of the decision is amenable to the judicial process. Are the courts qualified to deal with the matter or does the decision involve such questions of policy that they should not intrude because they are ill equipped to do so?...If, for example, it was clear that the Home Secretary had refused to pardon someone solely on the grounds of their sex, race or religion, the courts would be expected to interfere and, in our judgment, would be entitled to do so.⁷⁸

5.106 It has also been recognised that:

The question in a particular case may not seriously implicate considerations of finality – e.g. a public program of importance (rent control) yet not central to the emergency effort. Further, clearly definable criteria for decision [sic] may be available. In such case the political question barrier falls away: '[A] Court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared...[It can] inquire into whether the exigency still existed upon which the continued operation of the law depended.'⁷⁹

5.107 This approach appears equally applicable in Australia. In *Re Ditfort*⁸⁰ for example, Gummow J reached the conclusion that it is incorrect to assume that every case touching on foreign affairs lies beyond judicial consideration.

5.108 Moreover, where government is administering schemes within statutory limits set by parliament, the courts will enquire whether government is doing properly what it has authority to do.⁸¹

⁷⁶ *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31, 82.

⁷⁷ [1993] 4 All ER 442, QBD per Watkins, Neill LJ and Tuckey J.

⁷⁸ *Ibid*, 453-3.

⁷⁹ *Baker v Carr* (1961) 369 US 186, 213-214 quoting *Chastleton Corp v Sinclair* 264 US 543, 547-8.

⁸⁰ (1988) 19 FCR 347, 373.

Circumstances of the individual

5.109 In some situations, policy decisions may have a particular import for certain individuals. In those situations:

Despite the courts' general reluctance to review policy, particularly at an abstract level, there are cases where the critical question is whether the established policy should be applied to an individual in particular circumstances or what weight should be given to policy, along with other relevant factors. Judicial review may be available in some of these cases. In some instances where the critical question relates to the application of policy, it is possible not to apply the policy without prejudicing the objects which the policy is designed to achieve.⁸²

5.110 Pronouncements of the Court in relation to the treatment of cabinet decisions are also relevant and take the concept of exception a degree further. For instance, in *O'Shea's* case, while basing his decision on procedural fairness, Mason CJ recognised that cabinet may be involved in two different types of decisions – political policy decisions not open to judicial review and decisions more closely related to justice to the individual than with political, social and economic concerns.⁸³

5.111 According to Sir Anthony Mason in his reasoning in this case:

I thought that although Cabinet is primarily a political institution concerned with political, economic and social concerns, it might be called upon to decide questions more closely concerned with justice to the individual when a duty to act fairly could arise.⁸⁴

5.112 The courts have also sought to identify cases in which there is a legitimate expectation of some form of redress. In *FAI v Winneke*⁸⁵ for example, it was held that the decision of the government, including the Governor acting on the advice of Ministers concerning a particular company, was reviewable where it dealt with matters that might be subject to a legitimate expectation. Such an expectation would arise from the nature of

⁸¹ *Minister for Arts, Heritage and Environment v Peko Wallsend* (1987) 75 ALR 218, 280 per Sheppard J and 302 per Wilcox J.

⁸² The Hon Justice Sir Anthony Mason, 'The Importance of Judicial Review of Administrative Action as a Safeguard of Individual Rights' (December 1994) 1(1) *Australian Journal of Human Rights* 10.

⁸³ *South Australia v O'Shea* (1987) 163 CLR 378, 387. In his Blackburn lecture, Sir Anthony subsequently reiterated that 'in exceptional cases, judicial review may conceivably extend to a cabinet decision' – see Sir Anthony Mason Blackburn Lecture, 'Administrative Review - the Experience of the First Twelve Years' (1989) 18 *Federal Law Review* 122. In *O'Shea* Deane J at 417 also suggested that:

...common law rules of procedural fairness extend in the absence of a clear contrary legislative intention, to control any administrative decision which is made pursuant to a statutory process and which 'directly affects the rights, interest, status or legitimate expectations' of another in his individual capacity'.

⁸⁴ Sir Anthony Mason, 'Developments in Australian Administrative Law' (1998) 28 *Hong Kong Law Journal* 379.

⁸⁵ (1981) 151 CLR 342.

the decision: it might also arise from the existence of a regular practice which the affected person might reasonably expect to continue.⁸⁶

5.113 However:

The considerations by reference to which the reasonableness of a policy may be determined are rarely judicially manageable. For this reason, the court is slow to intervene when injustice has been done to individual rights by what may appear to be an unjust policy.⁸⁷

5.114 In conclusion, it has been said that:

On the authorities, the true test may well be: is the particular function appropriate for a court in the sense that the issues can be resolved by the application of legal principles and judicially manageable criteria and standards? If so, some functions involving policy may be inappropriate, others not so. If policy is to be dealt with according to judicial method, informing the formulation of principles to be applied to the case in hand, that is one thing, but if the court is required to deal with policy at large, then the function is non-judicial.⁸⁸

Previous Council consideration

5.115 In response to arguments that decisions should be excluded from review on the basis of their policy nature, the Council noted in its first report, *Administrative Decisions (Judicial Review) Act 1977, Exclusions Under Section 19, - 1978* that:

The Court is not concerned with Government policy except to the extent to which it produces an unlawful administrative decision. In this respect the powers of the Federal Court under the Act are no different from those of the High Court. Accordingly, the presence of large elements of policy in the making of a class of decision is not a ground for exclusion from the Act.⁸⁹

5.116 In its more recent publication *What Decisions Should be Subject to Merits Review?* the Council restated this view:

The fact that a decision-making power may be exercised by reference to a policy does not, in itself, exclude from review a decision made under the power.⁹⁰

⁸⁶ *Council of Civil Service Unions v Minister of Civil Service* [1985] AC 374; *Kioa v West* (1985) 159 CLR 550.

⁸⁷ The Hon Sir Gerard Brennan, 'The Purpose and Scope of Judicial Review', in M Taggart (ed) *Judicial Review of Administrative Action in the 1980s*, 1986, p 33.

⁸⁸ Sir Anthony Mason, 'Judicial Review: A View from Constitutional and Other Perspectives' (2000) 28(2) *Federal Law Review* 330, 337.

⁸⁹ Administrative Review Council, *Administrative Decisions (Judicial Review) Act 1977: Exclusions under Section 19*, Report No. 1, 1977, paragraphs 50-51.

⁹⁰ *Ibid*, paragraph 5.12, 27.

5.117 An exemption from merits review is recognised however for what are categorised as decisions with a high political content:

This exception relates to decisions that involve the consideration of issues of the highest consequence to the Government. Only rarely will decision-making powers fall within this exception, and it is unlikely that a decision-making power not personally vested in a Minister would suffice.⁹¹

5.118 The Council noted though, that even where the high political content exception applies, in some areas, it will only apply to a few of the total number of decisions made under a decision-making power.⁹² The Council therefore considered it preferable for a decision made under such a power to be subject to merits review with an exclusion mechanism in place to cover those decisions falling within the exception.⁹³

Discussion point 11

General treatment

5.119 It is suggested that in the majority of cases where 'low level' policy is involved, there is no difficulty in a court reviewing a decision made in the application of pre-existing policy. Where the decision-maker has misconstrued the policy, the decision may be set aside for failure to take account of relevant circumstances, that is, the policy.

5.120 The court may also consider whether in the application of policy, the decision-maker has had regard to the facts of the particular case, or has reached an unreasonable conclusion or has altered the policy to dictate the outcome rather than considering the special or particular circumstances of the case.

5.121 In a case where an executive decision-maker has specified criteria in a policy statement which is consistent with the statute and is not unreasonable, a decision ignoring the criteria will be *prima facie* bad. Similarly, a decision which fails in a particular case to recognise that policy criteria are satisfied may be considered unreasonable.

5.122 Where there is no existing policy, it is largely for the decision-maker to determine which matters he or she considers material.⁹⁴ Where the decision is

⁹¹ Administrative Review Council, *What Decisions Should be Subject to Merits Review?*, 1999, paragraphs 4.2, 23 and 24.

⁹² *Ibid*, paragraph 4.27.

⁹³ *Ibid*, paragraph 4.28.

⁹⁴ *Sean Investments Pty Ltd v MacKellar* (1981) 38 ALR 363, 375.

a one off decision, greater restraint should be exercised, but there seems no basis, beyond that, to seek to limit judicial review.

High policy

5.123 In areas of high policy, different considerations apply. While high policy may be a factor justifying exclusion of merits review in some cases⁹⁵ different considerations would apply in relation to judicial review. It may not be appropriate, in view of their subjectivity and quite often, their polycentricity, for a court to undertake judicial review of such decisions on the basis of grounds such as unreasonableness or irrelevant considerations. Where an application is made to the court on the basis of an error of law, however, or an abuse of power, there would seem no reason to restrict judicial review. Notwithstanding the 'high policy' element, it is still appropriate that the repository of that power (i.e. the decision-maker) exercise that power according to the law.

5.124 In those few cases where judicial review may not be appropriate, it may be argued that adoption of judicial concepts of justiciability and deference are more appropriate ways to achieve the correct balance between policy development and judicial review than the exclusion of certain policy decisions from the scope of judicial review by way of legislation.

Do you agree/not agree with these views?

Are there other relevant considerations?

Please elaborate.

Decisions related to the administration of justice

What are decisions related to the administration of justice?

5.125 Decisions falling within this category include those relating to investigation, arrest, prosecution, bail, summary trial, committal, the filing of a *nolle prosequi*, indictment, appeal and parole.

5.126 Opinion appears to be divided on the interaction of judicial review with the decision-making processes of the criminal justice system. Some point to the beneficial influence on the latter system of concepts of reasonableness and accountability. Others have raised concern at the

⁹⁵ Note the Council's view was that the exception would be limited and countervailing accountability requirements should apply - see Administrative Review Council, *What Decisions Should be Subject to Merits Review?*, 1999, paragraphs 4.27 - 4.29.

encroachment of judicial review on the area of criminal administration and expertise.⁹⁶

The executive perspective

5.127 Exemptions currently exist in Schedule 1 to the AD(JR) Act for:

- (r) decisions under the *Extradition Act 1988*;
- (w) decisions under the *Witness Protection Act 1994*;
- (x) decisions under subsection 60A(2B) of the *Australian Federal Police Act 1979*;
- (xa) decisions to prosecute persons for any offence against a law of the Commonwealth, a State or a Territory.

5.128 Arguments advanced in 1978 for exclusion of such decisions from review at the time of the writing of the Council's first report, *Administrative Decisions (Judicial Review) Act 1977, Exclusions under Section 19*, included:

- the Act may be used to hamper and frustrate the proper investigation and prosecution of offences
- the obligation to give reasons may necessitate the premature disclosure of information to the prejudice of an investigation
- there are adequate existing safeguards established to strike the right balance between the law enforcement agencies and the citizen
- it is inappropriate to subject law enforcement officers who are engaged in criminal investigation and prosecution to the obligations of the Act, particularly the obligation to give reasons; and
- most of the decisions lead to the matter being brought before a court and there are extensive appellate processes.⁹⁷

5.129 With respect to exemptions from judicial review provided for in the *Financial Transactions Reports Act 1993* and the *Witness Protection Act 1994*, the Government was motivated, respectively, by concerns that criminal investigations could be compromised, and for maintenance of the integrity of the program. In the context of the *Witness Protection Act 1994*, in responding to inquiries from the Scrutiny of Bills Committee, the then Minister for Justice said:

...the decision to exclude the operation of the AD(JR) Act was not taken lightly. It was done only after ensuring that there were internal review mechanisms...[the exemptions] are all designed to protect the integrity of the [program]. The importance of ensuring the safety of witnesses,

⁹⁶ See for instance, D J Galligan, 'Regulating Pre-trial Decisions', in N Lang (ed), *Criminal Justice*, 1994, p 151.

⁹⁷ See Administrative Review Council, *Administrative Decisions (Judicial Review) Act 1977: Exclusions under Section 19*, Report No. 1, 1977, paragraph 77.

their relatives and the AFP officers means that information must be subject to strict safeguards.⁹⁸

5.130 The Committee accepted this argument.

5.131 More recently, arguments for and against exclusions in this area have arisen in the context of the *Jurisdiction of Courts Legislation Amendment Act 2000*. Schedule 2 to this Act:

- removes the right of the defendant to challenge the decision to prosecute under both the AD(JR) Act, the *Judiciary Act 1903* and the *Corporations Act 1989*
- suppresses rights to review of other pre-trial decisions once the prosecution is brought to court, and until the trial and any subsequent appeals are completed,⁹⁹ and
- channels much of the remaining jurisdiction from the Federal to State and Territory courts.¹⁰⁰

5.132 The reason for the amendments, according to the Attorney-General in his second reading speech, was 'to avoid the use of unmeritorious delaying tactics in the criminal justice process by removing the collateral access of defendants to federal administrative law procedures and remedies'.¹⁰¹ In his response to the Senate Scrutiny of Bills Committee, the Attorney-General suggested that judicial review was 'frequently' a stalling tactic.¹⁰² He also noted in debate of the Bill that 'collateral attacks' generally lack merit and are 'invariably used only by defendants with deep pockets'.¹⁰³

5.133 Other arguments for the exclusion from review of such decisions included:

- to avoid fragmentation of proceedings between courts at different tiers of the federation
- to reduce cost and delay, and the consequential damage caused by delay to the prosecution case
- that defendants still have recourse to relief by way of section 75(v) of the Constitution and to review either side of the prosecution proceedings

⁹⁸ Senate Standing Committee for the Scrutiny of Bills, *First to Eighteenth Reports of 1994*, Parliamentary Paper No 472, 1994, p 201.

⁹⁹ In both instances, judicial review rights to the High Court under section 75(v) of the Constitution are not affected.

¹⁰⁰ For further discussion of these amendments, see Sean Brennan, 'Judicial Review and the Pre-trial Process' (2000) *AIAL Forum* No 26 33.

¹⁰¹ House of Representatives, Debates, *Hansard*, 8 March 2000, 14111.

¹⁰² Senate Standing Committee for the Scrutiny of Bills, *Sixth Report of 2000*, 10 May 2000, 172.

¹⁰³ House of Representatives, Debates, *Hansard*, 5 April 2000, 15328.

- that the criminal courts themselves provide safeguards through the discretion to deny admissibility to prejudicial evidence, the grant of permanent stays to prevent an abuse of process and the appeal system; and
- that the amendments place defendants in Commonwealth prosecutions in essentially the same situation as their State counterparts.

The judicial perspective

5.134 The position of the courts is that they will only ordinarily interfere with the processes of criminal justice by way of judicial review in exceptional circumstances.¹⁰⁴ This applies equally to committal proceedings, issuing a warrant, deciding to prosecute or arresting a suspect. In *Barton v The Queen*¹⁰⁵ for instance, the High Court decided that an exercise by the Attorney-General of the power to present an *ex officio* indictment is non justiciable. The court also noted that there was well established English authority that the prerogative powers to enter a nolle prosequi and to grant or refuse a fiat in connection with a relator action, are not justiciable. Clearly, policy considerations support this view. It would be undesirable for the courts to become closely involved in the question whether a prosecution should be commenced, when ultimately, it would be the task of the courts to determine the accused's guilt or innocence.

5.135 However, in *Barton's* case, Gibbs ACJ and Mason J held that where there was a suggestion of abuse of process, the court would stay a prosecution brought without reasonable ground, at least until a preliminary examination took place – where antecedent committal proceedings were dispensed with, a trial in their absence 'unless justified on strong and powerful grounds, must necessarily be considered unfair'.¹⁰⁶ The courts should not abdicate to the Attorney-General or the Crown prosecutor their function of deciding 'where on balance the interests of justice lie'.¹⁰⁷

5.136 Relevant factors for the courts have been said to include:

- that the courts should not be seen to stand too close to the executive decision to prosecute
- that there is strong public interest in the expeditious completion of criminal matters; and

¹⁰⁴ *Lamb v Moss* (1983) 49 ALR 533 affirmed in *Young v Quin* (1984) 56 ALR 165 and *Clyne v Scott* (1983) 52 ALR 405.

¹⁰⁵ *Barton v The Queen* (1980) 147 CLR 75, 92-3.

¹⁰⁶ *Ibid*, 100.

¹⁰⁷ *Ibid*, 101.

- fragmentation of proceedings between State and Federal courts should be avoided wherever possible.¹⁰⁸

5.137 In the Federal Court case of *Crane v Gething*,¹⁰⁹ French J reaffirmed the general principles of judicial restraint subject to exceptions in appropriate cases. In his view, success would be most likely in cases involving a pure question of law with no factual elements, where, though investigation has commenced, no proceedings are pending.

5.138 This generally cautious approach on the part of Australian courts may be contrasted with that in the UK where an application may always be pursued for the judicial review of a decision made by a magistrate or magistrates court. In one case for example, an order for certiorari by way of judicial review was granted to quash a conviction by a magistrate's court on the ground that there had been a denial of procedural fairness arising from the prosecutor's failure to disclose to the court and the defence the existence of witnesses who could have given evidence favourable to the defence.¹¹⁰ In another case, it was held that the sentence was so far outside the normal discretionary limits as to enable the reviewing court to say that its imposition must involve an error of law of some description even though it might not be evident at once what was the precise nature of that error.¹¹¹

Previous Council consideration

5.139 In its first Report, *Administrative Decisions (Judicial Review) Act 1977, Exclusions Under Section 19 - 1978*, the Council's majority recommendation was that all decisions relating to the administration of criminal justice (including the investigation, arrest, prosecution, bail, summary trial, committal, decision to file a *nolle prosequi*, indictment, appeal and parole of persons for any offence against a law of the Commonwealth) other than:

- appointments of investigators and inspectors under statutory powers
- the issue of search warrants and analogous warrants under the *Customs Act 1901* and other legislation; and
- decisions to require the production of documents, the giving of information and the summoning of persons as witnesses, be excluded from review under the AD(JR) Act.

5.140 The Council has said subsequently, in relation to a proposal to exclude committal proceedings from the AD(JR) Act, that certain questions are more appropriately resolved in a judicial review context by a court with specialist

¹⁰⁸ Sean Brennan, 'Judicial Review and the Pre-trial Process' (2000) *AIAL Forum* No 26 33, 37.

¹⁰⁹ *Crane v Gething* (2000) 97 FCR 9.

¹¹⁰ *R v Leyland JJ, ex parte Hawthorne* [1979] Crim LR 627.

¹¹¹ *R v St Albans Crown Court, Ex Parte Cinnamond* [1981] Crim LR 2453.

expertise in that area and that defendants should not have to wait for trial to get an answer, for instance, with respect to the jurisdiction of a magistrate to conduct a committal hearing.¹¹²

5.141 In 1993, in a letter to the Standing Committee on Legal and Constitutional Affairs about exemptions from the *Financial Transaction Reports Act 1988* (the FTRA), the Council took the view that decisions under that Act should not be exempted from judicial review.¹¹³ In response to concerns from the Attorney-General's Department that criminal investigations could be compromised if statements of reasons for decisions were required, the Council referred to recommendations made in its 33rd report in 1991, *Review of the Administrative Decisions (Judicial Review) Act: Statement of Reasons for Decisions*, that section 13A(1) of the Act should be amended to provide that information should not be revealed if it would 'disclose or enable a person to ascertain, the existence or identity of a confidential source of information in relation to the enforcement or administration of the law'. The Council recommended that this amendment should be expanded to cover decisions under the FTRA.

5.142 In 1999, in *What Decisions Should be Subject to Merits Review?*, the Council broadly endorsed the approach taken in its first report in 1978 report, noting that:

Decisions of a law enforcement nature, including decisions relating to investigations, should not be made subject to merits review. If review of such decisions was available, both the investigation of possible breaches and the subsequent enforcement of the law could be jeopardised.¹¹⁴

5.143 The Council gives as examples decisions to place people on the Witness Protection Program, and decisions that involve prosecutorial discretions, including whether the person concerned would be a valuable or useful witness. The Council notes, however, that a decision to remove someone from the Program would not be of the same quality as it would deprive the person concerned of an expectation of security and should be subject to merits review.¹¹⁵

¹¹² Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act; Redefining the Act's Ambit*, Draft Report 1988, Appendix B, 5.

¹¹³ Administrative Review Council letter to the Senate Standing Committee on Legal and Constitutional Affairs dated 26 April 1993, set out in the Council's *Seventeenth Annual Report, 1992 - 93*, p 129.

¹¹⁴ Administrative Review Council, *What Decisions Should be Subject to Merits Review?*, 1999, paragraph 4.31.

¹¹⁵ *Ibid*, paragraphs 4.32 and 4.33.

Discussion point 12

5.144 Having regard to the preceding discussion, it may be that where adequate alternative remedies exist in the criminal justice system, judicial review can be dispensed with.

5.145 However, where personal security is not an issue, where adequate alternative remedies do not exist in the criminal justice system, and where the judicial review system can offer protection to individual rights, then it might be that review should be available. Arguably, the matter is one which would be better determined at the judicial than the governmental level, on a case by case basis, rather than through the imposition, legislatively, of a total ban on access to judicial review or for specified periods.

Do you agree/not agree with these views?

Are there any other relevant considerations?

Please elaborate.

Decisions where there are ongoing relationships

5.146 As reflected in extrinsic material surrounding the passage through Parliament of the *Public Service Act 1999*, one of the major objectives of the review structure provided for in that legislation was to reduce the complexities and the legalism of previously existing review structures.

5.147 Consistent with this, the Public Service Act reflects an emphasis upon harmonisation and alternative means of resolving workplace disputes. Though decided well before the passage of the current legislation, the approach is reflected in the decision in *Ansell v Wells*.¹¹⁶ In that case, in determining the parameters of natural justice, it was said by the court that:

The procedures of the Promotions Appeals Committees, by applying statutory standards of relative efficiency and seniority in respect of officers of the Public Service, should be designed to ensure fairness to all concerned, but with the aim of fostering harmonious relations between fellow officers who must work or continue to work together and not of promoting discord between them.¹¹⁷

¹¹⁶ (1982) 43 ALR 41. See also *Finch v Goldstein* (1981) 36 ALR 287.

¹¹⁷ *Ansell v Wells* *ibid*, 60.

5.148 Arguably, the values saved by resort to legal action can rarely outweigh the damage to efficient administration, particularly where there are only marginal differences in merit between the candidates for promotion.

Discussion point 13

5.149 There may be some justification for limiting the right to be heard in employment-related cases, particularly where the attributes of various members of staff are being compared in a critical fashion.

5.150 Similarly, in the case of grounds such as unreasonableness and irrelevant considerations, the subjective nature of the process necessary to arrive at a conclusion may outweigh the benefits of judicial review. However, it is more difficult to argue that judicial review should be limited in cases where errors of law are in issue. As against all grounds of review, however, the existence of adequate alternative remedies and dispute resolution strategies would seem to be a significant factor in limiting judicial review rights.

5.151 The emphasis upon informal dispute resolution mechanisms and access to the specialist Merit Protection and Review Commission (at least for a full merits review hearing) under the *Public Service Act 1999* is noted in this regard.

Do you agree/not agree with these views?

Are there any other relevant considerations?

Please elaborate.

Legislative decisions

Introduction

5.152 Although there may be some overlap of judicial, executive and administrative powers,¹¹⁸ 'the primary characteristic of the activities of administrators in relation to legislation is to maintain and execute those laws'.¹¹⁹

5.153 However, legislative power may be delegated by the parliament to the executive subject to some measure of parliamentary control. This is most

¹¹⁸ For instance, judges may make rules of court, parliament may punish for contempt of parliament and administrators may make conclusive findings of fact.

¹¹⁹ See Gummow J in *Queensland Medical Laboratories v Blewett* (1988) 84 ALR 615.

often achieved by way of placing regulation-making power in the Governor-General in Council.

5.154 Subject to parliamentary control by way of disallowance, legislative power may also be given to other designated persons, for instance Ministers of State. It is in relation to this sort of power that issues arise as to the appropriateness, extent and nature of judicial review.

What are legislative decisions?

5.155 In the United Kingdom, it has been said that where a provision or rule is of general application, it is likely to be legislative in character, whereas, where it prescribes the application of a general rule to a particular situation, it is likely to be administrative.¹²⁰

5.156 In Australia, it has been held that a legislative decision is one involving making new rules of general application, that is, applying to the public at large or a defined section of the public, for example, all nursing homes.¹²¹ The classic statement of the distinction is that of Latham CJ in *Commonwealth v Grunseit*:

The general distinction between legislation and the execution of legislation is that legislation determines the content of a law as a rule of conduct or a declaration as to power, right or duty, whereas executive authority applies the law in particular cases.¹²²

5.157 Exceptions to this rule are rare.¹²³

5.158 Consistent with this, in its 35th report in 1992, *Rule Making by Commonwealth Agencies*, the Council considered legislative decisions to:

- have the effect of changing or determining the content of the law, rather than applying it
- be binding on the executive, rather than merely guidelines; and
- be of general application and not directed at a particular case.¹²⁴

5.159 This notwithstanding, as recognised by Gibbs CJ in the *Bread Manufacturers of NSW v Evans*,¹²⁵ the distinction between legislative and

¹²⁰ See the Donoughmore Committee, *Report of the Committee on Ministers' Powers*, 1932, Cmd 4060, 1.

¹²¹ *Nashua v Channon* (1981) 36 ALR 215.

¹²² (1943) 67 CLR 58, 82. See also *R v City of Munro Paragraph; ex parte John Weeks Pty Ltd* (1987) 46 SASR 400, 406; *Collins v Municipality of Wynyard* (Tas Sup Ct), Green CJ, unreported, 24 December 1987; *Botany Bay City Council v Minister of State for Transport and Regional Development* (unreported, Federal Court, Lehane J, 28 May 1996). See also *Yates Co Pty Ltd v The Vegetable Seeds Committee and Ors* (1946) 72 CLR 37, 54.

¹²³ For example, the *Builders Labourer's Federation (Special Provisions) Act* (NSW) enacted to abolish the Builders Labourer's Federation. See *Queensland Medical Laboratories v Blewett* (1988) 84 ALR 615.

¹²⁴ Administrative Review Council, *Rule Making by Commonwealth Agencies*, Report No 35, 1992, paragraph 3.4.

administrative decisions, while easy to state, is difficult to apply. In that case, which involved a challenge to the validity of an order made by the Prices Commission under the *Price Regulation Act 1948* concerning the sale-price of bread or bread products in NSW, His Honour said that:

The distinction between powers of an executive and those of an legislative nature is a fine one and opinions may easily differ on the question.¹²⁶

5.160 The difficulty of delineating the three major spheres of government was first noted by the UK Donoughmore Commission in 1932.¹²⁷ It would also seem that the requirement to publish the order or decision and provision that it be subject to judicial scrutiny by the parliament may be indicative of the legislative status of a determination. However, publication in the Commonwealth *Gazette* or the right of veto by the relevant Minister is not sufficient.¹²⁸

5.161 In the case of *Queensland Medical Laboratories v Blewett*, Gummow J also indicated that there were difficulties with the principle, noting that it was not an essential attribute of a 'law' that it formulate a rule of general application.¹²⁹ On that basis, he suggested that:

...it is difficult to see how a sufficient distinction between legislative and administrative acts is that between the creation or formulation of new rules of law having general application and the application of those general rules to particular cases.¹³⁰

5.162 In a Federal Court case, *Aerolineas Argentinas & Ors v Federal Airports Corporation*,¹³¹ the Court undertook an analysis of the character of a determination under section 56 of the *Federal Airports Corporation Act 1986* imposing security charges for large aircraft landing at major city airports in Australia from the date of their imposition until December 1993. In that case, it was held that the determination was administrative rather than legislative in character because:

¹²⁵ (1981) 180 CLR 404.

¹²⁶ *Ibid*, 416.

¹²⁷ Donoughmore Committee, *Report of the Committee on Ministers' Powers*, 1932, Cmd 4060, 1. See also Gibbs CJ in *Bread Manufacturers of NSW v Evans*, *Id*.

¹²⁸ See Beasley J, *Aerolineas Argentinas & Ors v Federal Airports Corporation* (1995) 63 FCR 100, [36]. Compare with *Nashua Australia Pty Ltd v Channon* (1981) 36 ALR 215 where it was held that the rules of natural justice apply to both judicial and administrative authorities and even purely administrative and executive powers. Even where a discretion is in one sense unlimited, that does not mean that it is not reviewable and could not be wrongly exercised or that the court could not intervene.

¹²⁹ *Queensland Medical Laboratories v Blewett* (1988) 84 ALR 615, 634 - 5 per Gummow J.

¹³⁰ *Ibid*, 635 per Gummow J.

¹³¹ *Aerolineas Argentinas & Ors v Federal Airports Corporation* (1995) 63 FCR 100 per Beasley J. See also *Federal Airports Corporation v Aerolineas* (1997) 50 ALD 54.

- it was not subject to disallowance by Parliament (a right of disapproval in the Minister not constituting such)
- it was not subject to pre-notification in the *Gazette*, a pre-condition for any by-law coming into effect; and
- it was subject to two forms of executive control - under the *Prices Surveillance Act 1983 (Cth)* and by the Minister.

The AD(JR) Act and legislative decisions

5.163 Under the AD(JR) Act a range of matters has been identified by the Federal Court as legislative and therefore non-reviewable:

- determinations under the *National Health Act 1953* relating to the brand of drugs that might be supplied¹³²
- customs tariff instruments¹³³
- fisheries management plans¹³⁴
- fisheries temporary management orders¹³⁵
- determinations relating to pathology services made under the *Health Insurance Act 1973 (Cth)*¹³⁶
- statements of principles made by Repatriation Medical Authority under the *Veterans Entitlement Act 1986 (Cth)*;¹³⁷ and
- licence area plans made under the *Broadcasting Services Act 1992 (Cth)*.¹³⁸

5.164 The distinction between legislative and administrative decisions has been eroded by the inclusion in the Judiciary Act of section 39B(1A)(c). This section confers jurisdiction on the Federal Court in matters 'arising under any laws made by the Parliament'.¹³⁹

The common law and legislative decisions

5.165 Rather than categorising decisions as legislative, the High Court has preferred to focus on the need for persons to be affected 'as individuals'¹⁴⁰ in a direct manner.

¹³² *ICI Australia Operations Pty Ltd v Blewett* (1989) 19 ALD 162.

¹³³ *Sanyo Australia Pty Ltd v Comptroller-General of Customs* (Fed C of A, Davies J, No 645/91, 12 March 1992, unreported), but noted by the Administrative Review Council in *Admin Review* (1992) No 32 68.

¹³⁴ *Bienke v Minister for Primary Industries and Energy* (1994) 125 ALR 151.

¹³⁵ *Donohue v Australian Fisheries Management Authority* [2000] FCA 901; Bulletin [5642]; BC200003816.

¹³⁶ *Melbourne Pathology Pty Ltd v Minister for Human Services and Health* (1996) 40 ALD 565.

¹³⁷ In *Vietnam Veterans' Association of Australia (NSW) Branch v Alex Cohen* [1996] 981 FCA 1 the Federal Court found that decisions of both bodies were not amenable to judicial review under either the AD(JR) Act or section 75(v) of the Constitution.

¹³⁸ *SAT FM Pty Ltd v Australian Broadcasting Authority* (1997) 46 ALD 305.

¹³⁹ See Australian Law Reform Commission Report 92, October 2001, *The Judicial Power of the Commonwealth, A Review of the Judiciary Act 1903 and Related Legislation*, 136.

¹⁴⁰ *Kioa v West* (1985) 159 CLR 550, 584 per Mason J, 619-621 per Brennan J and 632 per Deane J. See also

5.166 In the case of *Kioa v West*, while advertent to the distinction between decisions of a legislative and an administrative character, the critical point was regarded by Brennan J to be the impact on the individual:

The legislature is not likely to intend that a statutory power of a strictly legislative nature be conditioned on the observance of the principles of natural justice for the interests of all members of the public are affected in the same way by the exercise of such a power ... But the legislature is more likely to intend the exercise of a statutory power of an executive, administrative or quasi-judicial nature to be so conditioned if an exercise of the power singles out individuals by affecting their interests in a manner substantially different from the manner in which the interests of the public at large are affected. The approach is stated by Estey J. delivering the judgment of the Supreme Court in *Attorney-General of Canada v. Inuit Tapirisat of Canada* [citation omitted]:

" The answer is not to be found in continuing the search for words that will clearly and invariably differentiate between judicial and administrative on the one hand, or administrative and legislative on the other. It may be said that the use of the fairness principle ... will obviate the need for the distinction in instances where the tribunal or agency is discharging a function with reference to something akin to a lis or where the agency may be described as an 'investigating body' ... Where, however, the executive branch has been assigned a function performable in the past by the Legislature itself and where the res or subject-matter is not an individual concern or a right unique to the petitioner or appellant, different considerations may be thought to arise."¹⁴¹

5.167 As also noted by Mason J (as he then was) in *Kioa's* case:

The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention.

...But the duty does not attach to every decision of an administrative character. Many such decisions do not affect the rights, interests and expectations of the individual citizen in a direct and immediate way. Thus a decision to impose a rate or a decision to impose a general charge

R v Davies, Ex parte Menzies Hotel Pty Ltd (1983) 64 LGRA 53 which also reflects a move away from the distinction between legislative and other sorts of decisions.

¹⁴¹ (1985) 159 CLR 550, [24] per Brennan J. However, in the judgment of Gummow J in *Queensland Medical Laboratories v Blewett* (1988) 84 ALR 615, even although the decision of the Minister with regard to a new pathology services table was legislative in character, the fact that the committee which advised him was required to function in accordance with principles of procedural fairness brought the decision of the Minister within the scope of judicial review.

for services rendered to ratepayers, each of which indirectly affects the rights, interests or expectations of citizens generally does not attract this duty to act fairly. This is because the act or decision which attracts the duty is an act or decision –

" ... which directly affects the person (or corporation) individually and not simply as a member of the public or a class of the public. An executive or administrative decision of the latter kind is truly a 'policy' or 'political' decision and is not subject to judicial review".¹⁴²

Who should determine when persons are affected as individuals

5.168 Although there are a number of approaches that may be taken in determining when persons are affected as individuals, it has been suggested by one commentator that decision-makers should be allowed a choice 'in circumstances where consideration of individual interests is permissible, but not mandatory'.¹⁴³ In this situation, it is suggested, 'a hearing is required where the decision-maker elects to have regard to individual interests, but not where the decision is based on general considerations without regard to its effect on any particular individual'.¹⁴⁴ Under this approach, 'the critical approach is not how many people are affected, but whether the decision-maker has taken account of the effect on actual (as opposed to hypothetical) individuals'.¹⁴⁵

5.169 This approach was taken in *Dunlop v Woollahra Municipal Council*.¹⁴⁶ In that case, Wootten J concluded that although no hearing was required where the Council made a common rule (in relation to the exercise of statutory powers to fix building lines), the plaintiff in that case was entitled to a hearing since the action was based 'not on general considerations, but on particular matters arising in relation to the plaintiff's land'.¹⁴⁷

Government attempts to establish legislative rather than administrative decision-making regimes

5.170 It is noted that in at least one instance, the government has sought to limit the potential for litigation by making decision-making legislative rather than administrative in character. In the veterans' entitlements area for instance,¹⁴⁸ with the potential for litigation that might retard the making of SoPs, the RMA and the SMRC were set up as statutory corporations and their functions were clearly made legislative in character rather than

¹⁴² (1985) 159 CLR 550 at 584 quoting *Salemi v MacKellar (No. 2)* (1977) 137 CLR 396, 452, per Jacobs J

¹⁴³ M Aronson, B Dyer, *Judicial Review of Administrative Action*, 2000, p 341.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Dunlop v Woollahra Municipal Council* [1975] 2 NSWLR 446, 478-479.

¹⁴⁷ *Id.*

¹⁴⁸ For background, see earlier discussion in relation to consistency and predictability.

administrative. The intended effect was to exclude them from the AD(JR) Act and from section 39B (as it was then) of the *Judiciary Act*.¹⁴⁹

Discussion point 14

5.171 Having regard to the foregoing, particularly the impact of section 39B(1A)(c) of the *Judiciary Act*, it is suggested that distinction between legislative and administrative decisions has been eroded.

5.172 Having regard to the approach adopted in the cases referred to above, it is suggested that decisions that:

- determine the content of a rule of general application; and
- do not conclusively determine the application of such a rule in a particular case

should not be subject to the full range of judicial review. It is further suggested that this is a matter better determined by the courts than by the parliament.

Do you agree/not agree with these views?

Are there any other relevant considerations?

Please elaborate.

Decisions made in urgent or emergency contexts

5.173 It has long been recognised that the need for urgent action may result in the exclusion of natural justice.¹⁵⁰

5.174 The effect of the need for urgent action was discussed by Wilcox J in *Marine Hull & Liability Insurance Co Ltd v Hurford*,^{151a} a case concerning a statutory power to direct an insurance company under investigation not to issue or renew policies. In that case, a distinction was drawn by the court between cases where the powers themselves by their very nature are inconsistent with the obligation to accord an opportunity to be heard and powers which may on occasion, but not always need to be exercised

¹⁴⁹ It has been concluded that this approach is no longer available following the introduction of s 39B(1A)(c) of the *Judiciary Act* 1903.

¹⁵⁰ See for instance *White v Redfern* (1879) 5 QBD 15 relating to seizure and destruction of contaminated meat; *R v Davey* (1899) 2QB 301 relating to the isolation of sufferers of an infectious disease; *Minosea Pty Ltd v ACCC* (1994) 35 ALD 493 relating to the production of books for an inquiry.

¹⁵¹ (1985) 62 ALR 253.

urgently.¹⁵² In the second instance, issues arise as to whether the hearing requirement is always excluded, excluded only where urgency is established, or limited by urgency but never excluded.¹⁵³

Previous Council consideration

5.175 In seeking exemption from the application of the AD(JR) Act in 1978, some agencies argued that where a decision is made in an emergency context (eg where food is alleged to be a health hazard) there should be no judicial review because delay in making the decision or taking action to implement the decision could destroy the value and purpose of the decision itself.¹⁵⁴

5.176 The Council considered that the “urgent or emergency context in which some classes of decision are made is not a ground for exclusion since the significant changes made by the Act do not alter the law or practice to be taken with respect to these decisions.” This was because the Act does not:

- alter the rules relating to interlocutory injunctions; and
- a request for a statement of reasons or an application for an Order of Review does not operate to prevent the decision from being made and implemented.¹⁵⁵

Discussion point 15

5.177 In cases where there is a need to make decisions in urgent or emergency contexts, it may not be necessary to provide a right to be heard, although other grounds of review, such as actual or apprehended bias, unreasonableness and error of law would still apply. In many cases, the extent or nature of the urgency may not be able to be predicted: in such cases, it should not be sought to anticipate it by way of legislative limitation.

Do you agree/not agree with this view?

Are there any other relevant considerations?

Please elaborate.

¹⁵² Ibid, 259-260.

¹⁵³ See also comments in *Ridge v Baldwin* [1964] AC 40.

¹⁵⁴ See Administrative Review Council, *Administrative Decisions (Judicial Review) Act 1977: Exclusions under Section 19*, Report No. 1, 1977, paragraph 56.

¹⁵⁵ Administrative Review Council, *Administrative Decisions (Judicial Review) Act 1977: Exclusions under Section 19*, Report No. 1, 1977, paragraphs 57-58.

SECTION IV

Nature of the decision-maker

Status of the decision-maker

The judicial perspective

5.178 Case-law supports the view that the status of the decision-maker does not in itself limit the scope of judicial review.¹⁵⁶

5.179 In *R v Toohey; ex parte Northern Land Council*, the High Court held that the exercise of statutory power by the Queen's representative is justiciable on the ground of improper purpose or bad faith.¹⁵⁷ As noted earlier in Part (IV) of the paper in the discussion relating to justiciability, the fact that a decision-maker is a Minister or the Queen's representative¹⁵⁸ does not, in itself, preclude judicial review, though it may amend it in some case, in the context of particular grounds, notably that of procedural fairness.¹⁵⁹

5.180 However, the judgment of the High Court in *FAI Insurance Ltd v Winneke*¹⁶⁰ supports the view that the fact that a statutory position has been conferred on a decision-maker at the highest level (the Governor in that case), may suggest that the content of the rule relating to procedural fairness should be reduced. In that case, the court held that a decision of the Governor in Council refusing an application for renewal of a licence was reviewable for procedural fairness, the insurer not having had the opportunity to meet adverse comments of the Minister regarding their investments and financial position.

5.181 Susceptibility of the decision-maker to accountability via other accountability mechanisms is also a significant factor. Hence the role of parliament in calling Ministers to account was relevant as evident in comments by Gleeson CJ and Gummow J in *Minister for Immigration and Multicultural Affairs v Jia*, a case involving claims of actual and apprehended bias. In reviewing the approach taken in the Federal Court, their Honours noted as follows:

...both French J and Cooper J evaluated the statements and conduct of the Minister in the light of his political functions and responsibilities. This is a matter of importance. In considering whether conduct of a

¹⁵⁶ *Minister for the Arts, Heritage and the Environment v Peko Wallsend* (1987) 75 ALR 218, *South Australia v O'Shea* (1987) 163 CLR 378.

¹⁵⁷ (1981) 151 CLR 170.

¹⁵⁸ Similarly with decisions of cabinet. See *Minister for the Arts, Heritage and the Environment v Peko Wallsend* (1987) 75 ALR 218, *South Australia v O'Shea* (1987) 163 CLR 378.

¹⁵⁹ *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507.

¹⁶⁰ (1982) 151 CLR 342, 370 per Mason J.

decision-maker indicates prejudgment, or in some other respect constitutes a departure from the requirements of natural justice, the nature of the decision-making process, and the character of the person upon whom Parliament has conferred the decision-making capacity, may be of critical importance. French J was right to consider the Minister's conduct in relation to the radio interview, and the letter to the President of the Tribunal, in the light of the fact that he was "an elected official, accountable to the public and the Parliament and entitled to be forthright and open about the administration of his portfolio which ... is a matter of continuing public interest and debate."¹⁶¹

5.182 As noted by Kirby J in the same case, however:

Ministerial decisions are not the subject of the same requirements of actual and manifest independence and impartiality as are required by law of the decisions of courts and tribunals. Nevertheless, the misuse of high public office by a Minister for ends alien to the legislation conferring powers on the holder of that office would, self-evidently, involve a serious wrong-doing.¹⁶²

5.183 In many cases, there is authority (often stated legislatively) for the delegation of decision-making powers or the hearing function to others. In some cases, all that may be required is the adoption of the findings or recommendations of the person who performed the decision-making function. In such circumstances, it may be that the standard of procedural fairness required may differ from that where the power cannot be divulged to others.¹⁶³

5.184 However, according to Kirby J, also in *Jia's* case, the fact that a decision-making power was conferred by the Migration Act personally upon the Minister, that it could not be delegated to an administrative officer of the Department and that it had to be reported to parliament:

...does not mean that a Minister is at liberty to give vent to personal biases, idiosyncratic opinions, prejudice against a particular applicant or blanket rules, applied without regard to any specific features of the case at hand. Nor is a Minister at liberty to apply blindly his own, a departmental, a Party or even a Government policy which is inconsistent with the assumptions of individual justice and

¹⁶¹ (2001) 205 CLR 507, [78].

¹⁶² *Ibid*, [122].

¹⁶³ In *Hot Holdings Pty Ltd v Creasey* (2002) 193 ALR 90, a Minister's decision to approve a recommendation contained in a departmental minute was held to be valid, despite the fact that two officers involved in the preparation of the minute stood to benefit from the recommendation being carried out. The majority of the High Court found that there was no reasonable apprehension of bias, as the involvement of the two officers in the actual decision-making process was 'peripheral'.

administrative decision-making that are inherent in the grant of power by the Parliament.¹⁶⁴

5.185 His Honour also went on to say that:

Clearly the pressures, processes and nature of Ministerial decision-making differ from the judicial task. Consequently, the obligation imposed by the courts on officers of the Commonwealth, including Ministers, should not 'over-judicialise' the performance of their functions, including in the making of decisions required of them by statute. I accept that the Minister's remark on an early morning interview radio should not be dissected in the way sometimes appropriate to analyses of the considered reasons of a court or tribunal.

5.186 Comments in this case by Hayne J are also relevant:

It is trite to say that the content of the rules of procedural fairness must be 'appropriate and adapted to the circumstances of the particular case'. What is appropriate when decision of a disputed question is committed to a tribunal whose statutorily defined processes have some or all the features of a court will differ from what is appropriate when the decision is committed to an investigating body. Ministerial decision-making is different again.¹⁶⁵

Previous Council consideration

5.187 In *What Decisions Should be Subject to Merits Review?* the Council said that:

Factors that will not exclude merits review that lie in the nature of the decision-maker include:

- The decision-maker is an expert, or requires specialised expertise; and
- The decision-maker is of high status.

5.188 In relation to the latter, the Council noted that:

The status of the primary decision-maker is not a factor that, alone, will make decisions of that person inappropriate for merits review.

For example, the fact that the decision-maker is a Minister or the Governor-General, is not, of itself, relevant to the question of review. Rather, it is the character of the decision-making power, in particular its capacity to affect the interests of individuals, that is relevant.¹⁶⁶

¹⁶⁴ *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507, [137].

¹⁶⁵ *Ibid*, [181].

¹⁶⁶ Administrative Review Council, *What Decisions Should be Subject to Merits Review?*, 1999, paragraphs

Discussion point 16

5.189 Although the nature of the decision-making body or the status of the decision-maker should not in itself render judicial review necessary or unnecessary, it is suggested that it may nonetheless have an impact on the appropriate scope of judicial review. Where the status of the decision-maker is linked to the making of particular sorts of high level policy decisions, other considerations become relevant. The preferred view may be that the determination of such issues is best left to the courts.

Do you agree/not agree with these views?

Are there other relevant considerations?

Please elaborate.

Expert decision-makers

The judicial perspective

5.190 The courts have tended to take a cautious approach where the decision-maker is using special knowledge to make an assessment of a factual situation.¹⁶⁷

5.191 As noted by Gleeson CJ, Gummow, Kirby and Hayne JJ in *Corporation of the City of Enfield v Development Assessment Commission*:

The weight to be given to the opinion of the tribunal [or the decision-maker] in a particular case will depend upon the circumstances. These will include such matters as the field in which the tribunal operates, the criteria for appointment of its members, the materials upon which it acts in exercising its functions and the extent to which its decisions are supported by disclosed processes of reasoning.¹⁶⁸

5.192 However, as noted in earlier discussion:

Where the question is whether the tribunal acted within jurisdiction, it must be for the court to determine independently for itself whether that is the case.¹⁶⁹

5.20, 5.21 and 5.29.

¹⁶⁷ For example, the work of a specialist medical tribunal, *Hockey v Yelland* (1984) 157 CLR 124.

¹⁶⁸ (2000) 199 CLR 135, 154-155.

¹⁶⁹ *Ibid*, 155.

5.193 As stated by Gummow J in *Minister for Immigration and Multicultural Affairs v Eshetu*:

...whilst it is for this court to determine independently for itself whether in a particular case a specialist tribunal has or lacks jurisdiction, weight is to be given, on questions of fact and usage, to the tribunal's decision, the weight to vary with the circumstances. The circumstances will include such matters as the field in which the tribunal operates, the criteria for appointment of its members, the materials upon which it acts in the exercise of its functions and the extent to which its decisions are supported by disclosed processes of reasoning.¹⁷⁰

5.194 The more difficult cases would seem to be where the specialist body is required to make determinations that involve both the assessment of facts and the interpretation of the law, for example, determinations as to the existence of facts to meet criteria established by law.

Discussion point 17

5.195 It is suggested that the courts already show considerable deference to the expertise of expert decision-makers. If limitations are imposed by way of legislation, they should only relate to areas within the particular purview of the decision-maker and to grounds of review (identified earlier) which, by their nature, come close to the boundaries of merits review.

Do you agree/not agree with this view?

Are there any other relevant considerations?

Please elaborate.

Outside contractors

5.196 As remarked in the *Australian National Audit Office Audit Activity Report: January to June 2001*:

As a result of the greater use of outsourced services as significant elements of program delivery, project and contract management has become a major element of public administration.¹⁷¹

¹⁷⁰ (1999) 197 CLR 611, 655. His Honour notes that a similar approach has been adopted in Canada, at least with respect to findings of non-jurisdictional fact.

¹⁷¹ Industry Commission, *Competitive Tendering and Contracting by Public Sector Agencies*, Report No. 48, 1996, paragraph 1.46.

The executive perspective

5.197 Although there has been a concern at the possible reduction in executive accountability as a result of the greater use of outsourced services, the concern has been predominantly with broad-based agency accountability rather than with accountability to the service user.

5.198 For instance, in its 1996 report, *Competitive Tendering and Contracting by Public Sector Agencies*, the Industry Commission drew attention to the need to preserve accountability when services of government are contracted out:

The Commission agrees with numerous inquiry participants that, while responsibility to do certain things can be transferred, accountability for the results cannot.

Whatever the method of service delivery, a government agency must remain accountable for the efficient performance of the functions delegated to it by government...¹⁷²

5.199 More recently, in the *Commonwealth Procurement Guidelines and Best Practice Guidance*, the Government has said that:

When outsourcing an activity, agencies cannot outsource their responsibility to ensure the efficient and effective use of Commonwealth resources, or their accountability for performance. Outsourcing contributes to the quality of outcomes for an activity without affecting the existing accountability frameworks. When an agency outsources a function, it is still responsible for ensuring the services provider is meeting the agency's stakeholder need.¹⁷³

5.200 It has been said further that:

The principle that agencies remain accountable for an activity even though the activity is subject to commercial tendering and contract does not mean that there is a common set of accountability arrangements which applies to all providers. A number of factors will need to be balanced to ensure that providers are subject to the mix of accountability arrangements that maximise the benefits of competitive tendering and contracting but protect the interests of relevant stakeholders. Agencies will need to consider, on a case by case basis, the level of access the agency and the Australian National Audit office require to a provider's records, information and assets (including premises) to adequately monitor a provider's performance. This can be stated in the contract.¹⁷⁴

¹⁷² Ibid, paragraphs 4-5.

¹⁷³ Department of Finance and Administration, *Commonwealth Procurement Guidelines Best Practice*, September 2001, 15.

¹⁷⁴ Commonwealth of Australia 1998, *Competitive Tendering and Contracting*, AGPS, Canberra, 16-18.

5.201 This approach does not provide individuals with a direct right of recourse against the decision-maker.

5.202 The implications of recent amendments to the *Privacy Act 1988* to extend its application to personal information held by contractors in relation to services provided to the Commonwealth or to other persons is relevant in this regard.¹⁷⁵ The Council understands that the Government is currently considering whether to extend the *Freedom of Information Act 1982* to requests by individuals about themselves held by the contractors for access to and correction of personal information held by them on behalf of the government.

The Council perspective

5.203 As noted by the Council in 1998 in its 42nd report, *The Contracting Out of Government Services*, judicial review under the Constitution and section 39B of the Judiciary Act is not limited to review of a decision taken under an enactment. Decisions taken by a contractor under a non-statutory scheme may therefore, in appropriate cases, be the subject of an application to the High Court or the Federal Court for a writ of mandamus or prohibition or an application for an injunction.¹⁷⁶ In contrast, the AD(JR) Act currently only extends to review of a decision under an enactment.¹⁷⁷

5.204 Recently, the Government paid recognition to the importance of transparency and accountability when managing government contracts. It indicated that the Ombudsman should have the jurisdiction to investigate actions of private sector organisations contracted by Commonwealth agencies to provide goods or services to the public and that it will consider amending the *Ombudsman Act 1976* to achieve this.¹⁷⁸

5.205 The Government has also indicated that it does not support the view that commercial information is inherently confidential and that any decision to withhold information on commercial-in-confidence grounds needs to be fully substantiated, stating the reasons why such information should not be disclosed.¹⁷⁹ It has also agreed in principle to the access by auditors to the premises of government contractors.¹⁸⁰

¹⁷⁵ *Privacy Amendment (Private Sector) Act 2000 (Cth)*.

¹⁷⁶ Administrative Review Council, *The Contracting Out of Government Services*, Report No 42, 1998, paragraph 6.41.

¹⁷⁷ However, the impact of section 39(1A)(c) of the *Judiciary Act* should be noted.

¹⁷⁸ 379th Report, *Joint Committee of Public Accounts and Audit Contract Management in the Australian Public Service, Whole of Government Response*, tabled out of session, Monday, 22 April 2002.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

Discussion point 18

5.206 In its 42nd report, the Council recommended that 'the AD(JR) Act should extend to include a decision of an administrative character made or proposed to be made, by an officer under a non-statutory scheme or program, the funds for which are authorised by an appropriation made by Parliament.' (Rec 22) The emphasis here is upon the nature of the decision rather than the nature of the decision-maker.

5.207 It is suggested that this and other recommendations made in the report No 42 relating to the accountability of outside contractors remain an appropriate response in this area.

Do you agree/not agree with this view?

Are there other relevant considerations?

Please elaborate.

Government business enterprises

5.208 It has been remarked that:

Judicial review can occasionally remedy individual grievances but rarely provides systemic relief. The decision to litigate and to maintain the litigation can be happenstantial...Review in the wake of privatisation and outsourcing carries the additional problem that the complainant is typically conceived as a consumer with a consumer complaint, which is not the business of judicial review.¹⁸¹

What is a GBE?

5.209 In the Council's first report, *Administrative Decisions (Judicial Review) Act 1977, Exclusions Under Section 19, - 1978*, the Council devoted a number of paragraphs¹⁸² to consideration of submissions that a number of statutory authorities¹⁸³ should be excluded from the application of the Act on the basis

¹⁸¹ Mark Aronson, 'A Public Lawyer's Response to Privatisation and Outsourcing' in M Taggart (ed), *The Province of Administrative Law*, 1997, 40.

¹⁸² Administrative Review Council, *Administrative Decisions (Judicial Review) Act 1977: Exclusions under Section 19*, Report No. 1, 1977, paragraphs 68 - 73.

¹⁸³ In the absence of other considerations, where a statutory authority is exercising executive government functions, it is subject to constitutional review and to review under the AD(JR) Act. As noted by McHugh J in *Australian Securities Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559, [147]: 'When a Commonwealth authority exercises executive functions of the Commonwealth in a manner akin to that in which ASIC is required to do under the ASIC Act, that authority is 'the Commonwealth' for the purposes of section 75(v) of the Constitution and sections 39, 39B, 56, 57 and 64 of the Judiciary Act.'

of their commercially competitive natures.¹⁸⁴ In its 32nd report in 1989, consistent with an increasing sophistication in the manner of government involvement in business activities, a shift in terminology was apparent, with growing reference to 'government business enterprise'.

5.210 In its 38th report in 1995, *Government Business Enterprises and Commonwealth Administrative Law*, this evolutionary trend was almost complete, with only fleeting reference to 'statutory authorities'.

5.211 In this report, the Council defined government business enterprises (GBEs) as bodies owned (or partly owned) by government, that are principally engaged in commercial activity, and that are separate legal entities from government. GBEs have characteristics in common with private enterprise (for example, selling goods or services commercially for financial return) while also belonging to the public sector as a result of government ownership and the requirement to operate in accordance with government policy.¹⁸⁵ Some may become incorporated and some may be privatised.

5.212 Government business enterprises are subject to the *Commonwealth Authorities and Companies Act 1997*, the *Corporations Law 1997*, Governance Arrangements and their own enabling legislation (the *Australian Postal Corporation Act 1989* for instance). They provide services collectively consumed by members of the public, including education, health care, transport, public housing, land use regulation and urban planning.

5.213 Examples of government business enterprises include Telstra Corporation, Australia Post, the Snowy Mountains Hydro Electric Authority, the Defence Housing Authority and the Australian Government Solicitor.

The judicial perspective

5.214 Decisions of a GBE that are commercial decisions, or decisions made other than pursuant to specific statutory powers are unlikely to be reviewable under the AD(JR) Act although review may be available in limited circumstances under the Constitution or in the State Supreme Courts.

5.215 To come within the ambit of the AD(JR) Act, as with outside contractors, a decision must be 'of an administrative character made...under an enactment' within the meaning of section 3 of the AD(JR) Act. Most day to day decisions made by a GBE, particularly commercial decisions (such as

¹⁸⁴ Such bodies included the Australian Industry Development Corporation, the Australian National Airlines Commission, the Australian National Railways Commission, the Australian Shipping Commission, the Canberra Commercial Development Authority, the Commonwealth Banking Corporation, the Commonwealth Serum Laboratories, the Health Insurance Commission, the Housing Loans Insurance Corporation and the Reserve Bank of Australia.

¹⁸⁵ Administrative Review Council, *Government Business Enterprises and Administrative Law*, Report No 38, 1995, paragraph 2.1.

decisions concerning or made under contracts) are unlikely to fall within this definition as they are made under general powers rather than under a statute.¹⁸⁶

5.216 Under section 75(iii) of the Constitution, whether a particular GBE may be a person 'suing or being sued on behalf of the Commonwealth' is a question to be determined in each case by reference to the particular legal structure and circumstances of the GBE.

5.217 Under section 75(v), GBEs are not themselves 'officers of the Commonwealth'. Whether an officer of a GBE is an 'officer of the Commonwealth' will depend in each case on factors such as whether the person is appointed, paid, controlled and removable by the Commonwealth, or is appointed by the Commonwealth to exercise a function of the Commonwealth.¹⁸⁷

The executive perspective

5.218 Corporatisation of GBE's tends to be accompanied by a requirement for 'competitive neutrality', a concept described in the *Hilmer Report*.¹⁸⁸ In such an environment, administrative law becomes an 'unnecessary impediment' to neutral and hence effective competition with private sector business.¹⁸⁹

5.219 The *Humphrey Report*¹⁹⁰ concluded that as GBEs generally trade in goods and services in the market, their activities are not administrative. The Report recommended that GBEs be exempt from statutory administrative law. This approach was subsequently confirmed by the Government in June 1997 upon the introduction of new *Governance Arrangements for Commonwealth Government Business Enterprises*.

5.220 However, in its report on *Corporate Governance and Accountability Arrangements for Commonwealth Business Enterprises*,¹⁹¹ the Joint Committee of Public Accounts and Audit was of the view that, depending on their responsibilities, some aspects of administrative law should apply to GBEs. The Committee was of the view that each GBE should be examined on a case by case basis to determine what aspects of administrative law should apply.

¹⁸⁶ See for example, *General Newspapers Pty Ltd v Telstra Corporation* (1993) 117 ALR 629.

¹⁸⁷ See *The Commonwealth of Australia v Bogle* (1953) 89 CLR 229 and *Deputy Commissioner for Taxation v State Bank of NSW* (1992) 174 CLR 219.

¹⁸⁸ See the Hilmer Report, *Report of the Independent Committee of Inquiry on National Competition Policy*, 1993, Chapter 13.

¹⁸⁹ *Ibid*, at 296.

¹⁹⁰ R Humphrey, *Review of GBE Governance Arrangements*, March 1997.

¹⁹¹ Joint Committee of Public Accounts and Audit, *Corporate Governance and Accountability Arrangements for Commonwealth Business Enterprises*, Report No 372, December 1999, p xix.

Other views

5.221 It has been noted by Justice Finn that:

...a statutory corporation as an agency of government can have no private or self-interest of its own separate from the public interest it is constitutionally bound to serve. It is this that sharply differentiates such a corporation from one that is privately owned.

and

...despite the growing tendency to approximate the duties of directors of statutory corporations to those of Corporations Law directors – as witnessed by section 21ff of the *Act 1997* – the gulf between the two remains large and unbridgeable (at least without constitutional upheaval).¹⁹²

5.222 Similarly, in *Hughes* case, His Honour said:

There is, I consider, much to be said for the view that, having no legitimate private interest in the performance of its functions, a public body (including a state owned company) should be required as of course to act fairly towards those with whom it deals at least in so far as this is consistent with its obligation to serve the public interest (or interests) for which it has been created.¹⁹³

Previous Council Consideration

Report No 1, 1977/8

5.223 In its first report *Administrative Decisions (Judicial Review) Act 1977, Exclusions under Section 19, 1978*, the Council did not accept the argument for exemption from the AD(JR) Act of statutory authorities engaged in commercial activities. Instead it felt that:

- because the authorities are Commonwealth instrumentalities they should be subject to judicial review in the same way as other Commonwealth bodies
- confidential information would not need to be disclosed
- there is not always the choice on the part of the consumer to deal with another service provider; and
- the extent to which the authorities are seen by outsiders to be related to the government will not be affected by their inclusion or exclusion from the Act.

¹⁹² Justice Paul Finn, 'The State Corporation' June 1999 3(1) *The Flinders Journal of Law Reform* 1, 4 referring to his judgment in *Hughes Aircraft Systems International Air services Australia* (1997) 146 ALR 1, 40.

¹⁹³ *Ibid*, p 6.

5.224 The Council was divided as to the application of the Act to commercially competitive statutory authorities. By a narrow majority the Council recommended against exemption. The arguments in favour of exemption were:

- applying the Act to them puts them at a commercial disadvantage
- competitors may get access to vital information through reasons statements or discovery
- competitors may use the Act to delay or hamper activities of the body
- a person is not as affected by the decision, because they can obtain the services from another body; and
- parliament's desire to place these bodies on an equal footing with private businesses.

5.225 The arguments against exemption were:

- as government bodies, statutory authorities must be subject to the rule of law like all other bodies
- although they may be engaged in some commercial activities, statutory authorities are not truly equal to their competitors
- in many instances, there is no real freedom of choice for consumers, who must continue to deal with the authority; and
- the AD(JR) Act protects against the release of commercially sensitive or confidential information.

Report No 32, 1989

5.226 In its 32nd report, Review of the Administrative Decisions (Judicial Review) Act: Ambit of the Act, the Council was of the view that:

...the Australian community has the right to expect that decisions of government business enterprises are made according to law to the same extent as decisions of other government agencies.¹⁹⁴

5.227 While noting that it would be of concern if significant use was made of the AD(JR) Act to challenge commercial decisions, and that such a situation could place such enterprises at a disadvantage in the market, the Council was not of the view that significant use of the Act was being made for such purposes. In the case of those GBEs not created under statute but incorporated under companies legislation, the Council considered that 'the controls imposed by the requirements of company law provide[d]...a sufficient substitute for control through the judicial review jurisdiction of the courts'.

¹⁹⁴ Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act*, Report No 32, 1989, paragraph 436.

Report No 38, 1995

5.228 In its 38th report, *Government Business Enterprises and Administrative Law*, the Council said that:

...GBEs should [not] be under any special obligation to operate as 'model' businesses in respect of their commercial activities undertaken in a competitive market. Instead the Council considers that the standards of fairness governing these activities should be the same as those that apply throughout the market place.¹⁹⁵

5.229 In the report, the Council concluded that:

- Commonwealth administrative law statutes should prima facie apply to bodies that are government-controlled, including GBEs; and
- GBEs should be exempt from the operation of Commonwealth administrative law statutes in relation to their commercial activities undertaken in a market where there is real competition.¹⁹⁶

5.230 Consistent with this, the Council was of the view that the Ombudsman Act and the Archives Act should not apply to the commercially competitive activities of a GBE undertaken in a truly competitive market, although the Ombudsman should make the initial decisions as to whether the relevant commercial activities of a GBE are in fact performed in a truly competitive market.¹⁹⁷

5.231 As in its 1989 report, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act*, the Council recommended that the scope of the AD(JR) Act should be expanded to embrace decisions of an officer of the Commonwealth under a non-statutory scheme that is funded out of monies appropriated by parliament specifically for the purposes of that scheme.¹⁹⁸

5.232 In response to this approach it has been said that:

With respect, this [approach] does not indicate why the presence of the 'competition factor' makes removal of administrative law review appropriate. Administrative law review is simply a casualty of the overwhelming political pressure to place corporatised GBEs in a position of 'competitive neutrality' ... There is no inquiry as to how competition in the market will promote the values of openness, rationality, fairness and participation which are protected by

¹⁹⁵ Administrative Review Council, *Government Business Enterprises and Commonwealth Administrative Law: Report to the Minister for Justice*, Report No 38, 1995, paragraph 4.27.

¹⁹⁶ Ibid, paragraph 4.29.

¹⁹⁷ Ibid, paragraphs 4.35 and 4.42.

¹⁹⁸ Ibid, paragraph 4.51.

administrative law review...public power will continue to be exercised by corporatised GBEs and indeed by privatised GBEs. A fruitful avenue for promoting values of rationality, fairness, openness and participation in their decision-making would be recognition of their public powers and the creation of statutory private rights, perhaps appropriately called 'community service rights', by which it may be controlled.¹⁹⁹

Discussion point 19

5.233 It is suggested that the views with respect to judicial review expressed by the Council in its 38th Report, *Government Business Enterprises and Commonwealth Administrative Law*, remain an appropriate response in this area.

Do you agree/not agree with this view?

Are there other relevant considerations?

Please elaborate.

Decisions by certain other government bodies

Intergovernmental bodies

5.234 In response to inquiries by the Council in the preparation of its first report, *Administrative Decisions (Judicial Review) Act 1977, Exclusions Under Section 19, -1978*, it was submitted that authorities established jointly by Commonwealth and State Governments or Commonwealth and foreign governments should not be subject to the AD(JR) Act.

5.235 In response to this claim, the Council noted that decisions of such authorities made under a Commonwealth enactment were currently subject to review and that exclusion from the Act would not exempt them from judicial review but only restrict the forum for review to the High Court or, in limited cases, the Supreme Courts of the Territories.²⁰⁰

Consultative and advisory authorities not dealing directly with the public

5.236 In seeking exemption from the application of the AD(JR) Act, it was suggested that departments not dealing directly with the public, or which act

¹⁹⁹ Margaret Allars, 'Private Law But Public Power: Removing Administrative Law Review From GBEs' (March 1995) 6(1) *Public Law Review* 44, 76.

²⁰⁰ See Administrative Review Council, *Administrative Decisions (Judicial Review) Act 1977: Exclusions under Section 19*, Report No. 1, 1977, paragraph 59.

in a consultative or advisory capacity, should not come within the ambit of the Act.

5.237 In response, in its first report, *Administrative Decisions (Judicial Review) Act 1977, Exclusions under Section 19 – 1978*, the Council said:

Where authorities do not make decisions affecting a person's interests, then no person would have standing to make an application under the Act. Where a consultative or advisory authority does not make decisions of an administrative character its decisions will not fall within the terms of the Act.²⁰¹

5.238 The Council concluded that in so far as these authorities fall within the terms of the Act and their decisions affect the interests of members of the public, then judicial review should be available.²⁰²

Discussion point 20

5.239 On the basis of the foregoing, it is suggested that the approach adopted by the Council in its first report and outlined above remains an appropriate response in this area.

Do you agree/not agree with this view?

Are there other relevant considerations?

Please elaborate.

SECTION V

Other

No impact upon final decision

5.240 In circumstances where the alleged irregularity would not have resulted in a different result being reached, there is some authority for the view that there may be a discretion to deny a remedy. As noted in *Re Refugee Tribunal; ex parte Aala*,²⁰³ such a situation may occur where, irrespective of any question of procedural fairness or merit, the decision was one which the decision-maker was bound by the governing statute to refuse. Alternatively, there may not have been an opportunity to make submissions on a point of

²⁰¹ Ibid, paragraph 61.

²⁰² Id.

²⁰³ (2000- 2001) 204 CLR 82.

law which must clearly be answered unfavourably to the prosecutor. As also noted in *Aala*, the concern of judicial review:

...is with observance of fair decision-making procedures rather than with the character of the decision which emerges from the observance of those procedures. Unless the limitation ordinarily implied on the statutory power is to be rewritten as denying jurisdictional error for 'trivial' breaches of the requirements of procedural fairness, the bearing of the breach upon the ultimate decision should not itself determine whether prohibition under s75(v) should go.²⁰⁴

5.241 However:

Not every breach of natural justice affects the making of a decision. The decision-maker may have entirely upheld the case for the party adversely affected by the breach; or the decision may have turned on an issue different from that which gave rise to the breach of natural justice. Breach of the rules of natural justice, therefore, does not automatically invalidate a decision adverse to the party affected by the breach...²⁰⁵

5.242 The High Court has also said that:

Nevertheless, once a breach of natural justice is proved, a court should refuse relief only when it is confident [emphasis added] that the breach could not have affected the outcome...²⁰⁶

No injustice

5.243 In one British decision involving applications for certiorari and declarations, it has been said that:

[An applicant] may be debarred relief if he has acquiesced in the invalidity or waived it. If he does not come with due diligence and ask for it to be set aside, he may be sent away with nothing. If his conduct has been disgraceful and he has in fact suffered no injustice, he may be refused relief.²⁰⁷

5.244 In relation to procedural fairness, however:

... the conditioning of a statutory power so as to require the provision of procedural fairness has, as its basis, a rationale which differs from that which generally underpins the doctrine of excess of power or jurisdiction. The concern is with observance of fair decision-making

²⁰⁴ Ibid, [59] per Gaudron and Gummow JJ.

²⁰⁵ Ibid, [104] per McHugh J.

²⁰⁶ Id.

²⁰⁷ *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry*, [1975] AC 295, 320 (CA), per Denning MR; affirmed [1975] AC 329.

procedures rather than with the character of the decision which emerges from the observance of those procedures. Unless the limitation ordinarily implied on the statutory power is to be rewritten as denying jurisdictional error for 'trivial' breaches of the requirement of procedural fairness', the bearing of the breach upon the ultimate decision should not itself determine whether prohibition under s 75(v) should go. The issue always is whether or not there has been a breach of the obligation to accord procedural fairness, and if so, there will have been jurisdictional error for the purposes of s 75(v).

Cases said to turn upon 'trivial' breaches are often better understood on other grounds. In particular...where the obligation to afford procedural fairness exists, its precise or practical content is controlled by any relevant statutory provisions and, within the relevant legislative framework, this will vary according to the circumstances of the particular case.²⁰⁸

Discussion point 21

5.245 From the foregoing it would seem that there is a range of factors relevant to whether or not judicial review should lie. Arguably, such matters are ones upon which the courts should rule as it depends very much on the circumstances of the particular case. As such, they are not matters appropriate for legislative intervention.

Do you agree/not agree with this view?

Are there other relevant considerations?

Please elaborate.

²⁰⁸ *Re Refugee Tribunal; Ex parte Aala* (2000-2001) 204 CLR 82, [60], [109] per Gaudron and Gummow JJ.

PART VI - THE EXISTENCE OF ADEQUATE ALTERNATIVE REMEDIES

INTRODUCTION

SECTION I

Two perspectives

The executive perspective

The judicial perspective

SECTION II

What is an adequate alternative remedy

Nature of the review right

Adequate alternative remedies – two case studies

SECTION III

The grounds of review

Error of law

Procedural fairness

Unreasonableness, irrelevant considerations etc

Concluding comments

SECTION IV

Merits review

The judicial perspective

The executive perspective

Previous Council consideration

INTRODUCTION

6.1 In approaching the issue of alternative remedies, it is important to bear in mind that judicial review is but one element in our administrative justice system. As well as judicial review, there is also internal review by a superior officer, merits review by a tribunal and official scrutiny mechanisms such as

the Ombudsman, the parliamentary member whose constituent is affected by a decision, and the Minister who may be the subject of representations on the matter. Additionally, there is access to the courts in many cases, either by way of limited or full appeal.

6.2 Unofficial mechanisms which may also have a significant impact on the political process include non-government organisations and the media. Access to official documents by way of freedom of information and statutory requirements for the provision of statements of reasons are also important, while systemic issues may be addressed by Commonwealth and State Auditors-General.

6.3 It has been noted that widening the scope of judicial review brings 'a greater risk that the efficient administration of government will be impaired' and possibly 'a fragmentation of the process of administrative decision-making and [setting] at risk the efficiency of the administrative process'.¹

SECTION I

Two perspectives

The executive perspective

6.4 In its 1973 *Report on Prerogative Writ Procedures*, the Ellicott Committee took the view that where specific appeal regimes are in place, the courts should be able to decline judicial review jurisdiction.² The Committee noted that:

In relation to some statutory discretions, provision is already made for judicial review before the courts, for example, under the taxation law. We think it is desirable that where this is the case the court exercising the jurisdiction for general judicial review should have power to decline to exercise its jurisdiction.³

6.5 This argument was used by some agencies in seeking exemption in 1978 from the application of the AD(JR) Act: it is reflected in paragraph 10(2)(b)(ii) of the Act, which provides that the Court may decline to review an application if it considers that adequate provision is made under another enactment for review of a decision by the Federal Court, another court, tribunal or person. The form of review that will supplement judicial review is very broadly defined in sub-section 10(3) of the Act to include reconsideration, rehearing, appeal, injunction and declaration. From this, it

¹ *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 336-7 per Mason CJ in the context of the ambit of the concept of 'decision'.

² The Ellicott Committee report, paragraph 33.

³ Id.

follows that, subject to the discretionary limitations established by sub-section 10(2), the AD(JR) Act remedies are intended to be generally available.

6.6 In the Explanatory Memorandum to the *Administrative Decisions (Judicial Review) Amendment Act 1980*, which inserted the current Schedule 1 into the AD(JR) Act, several references are made to the Government not wanting applicants 'short circuiting' the statutory appeal procedures and going straight to the Federal Court. Similar arguments were also relied on for example in relation to exclusion of decisions under the *Income Tax Assessment Act 1936* and, more recently, under the *Jurisdiction of Courts Legislation Amendment Act 2000* and the *Workplace Relations Act 1996*, from review under the AD(JR) Act.

The AD(JR) Amendment Bill 1986

6.7 This Bill, which was ultimately blocked in the Senate, represents the most significant legislative attempt to restrict judicial review on the basis of the existence of alternative remedies. It would have provided for the near automatic refusal of relief under the Act where there were either alternate means of review or where the proceeding challenged was not complete, unless the interests of justice required otherwise. Proposed section 10(2)(d)(iii) of the Bill would have required the court to consider whether it was:

...desirable to refuse to grant the application in order to avoid interference with the due and orderly conduct of the proceedings...or for the reason that...the balance of convenience (including the interest of the applicant, another party or any other person, the public interest and the consequences of delay in those proceedings) so requires.

6.8 The aim, according to then Attorney-General, the Hon Lionel Bowen, was to reduce delay and increase administrative efficiency, as proceedings were increasingly being fragmented by interlocutory AD(JR) applications. In supporting the Bill, the Attorney-General's Department noted that:

Where there is an effective administrative review of administrative action by an independent body, persons affected by that action should be encouraged to use that remedy, rather than to seek resort to the Federal Court under the AD(JR) Act in the first instance.⁴

6.9 The Bill took into account recommendations made by the Council in its 26th Report in 1986, *Review of Administrative Decisions (Judicial Review) Act 1977 - Stage 1*, but went further than had been recommended by the Council by requiring the Federal Court to refuse applications made under the Act where the applicant had an alternative right to seek review unless the applicant

⁴ Quoted in the Senate Inquiry into the *Administrative Decisions (Judicial Review) Bill 1986*, *Parliamentary Paper 212*, 1987, paragraph 4.4.

satisfied it that the interests of justice required that it should not refuse to grant the application.

6.10 In considering the Bill, the Senate Legal and Constitutional Legislation Committee recognised the need to strike a balance between merits and judicial review, and that applicants should be encouraged to use merits review before resorting to judicial review. The Committee also recognised that there was a problem of applicants 'leap-frogging' merits review and proceeding straight to judicial review for tactical reasons. However, the Committee was loathe to recommend restricting judicial review for all applicants because of a few unmeritorious vexatious ones.

The judicial perspective

6.11 The existence of an adequate alternative remedy represents an important factor for the courts in determining whether or not judicial review should lie.⁵

6.12 Under the AD(JR) Act, however, the Federal Court has tended to start from the presumption that if the court has jurisdiction to entertain an application for judicial review, the application should not be refused merely because there is some other remedy available, unless there are strong reasons to the contrary. It has been held that the onus persuading the court to examine the discretion adversely to the applicant rests with the respondent party requesting the exercise of the discretion.⁶

6.13 Under the Constitution, the court also retains a discretion to grant relief, amongst other things, having regard to whether there is a more convenient remedy. In one case for instance, in relation to the writ of mandamus, it was said by the High Court that mandamus is not a 'writ of right' and that there are 'well recognised grounds upon which the court may, in the exercise of its discretion, withhold the remedy', including that:

...the writ may not be granted if a more convenient and satisfactory remedy exists, if no useful result could ensue, if the party had been guilty of unwarrantable delay or if there has been bad faith on the part of the applicant, either in the transaction out of which the duty to be enforced arises or towards the court to which the application is made.⁷

6.14 In another decision of the High Court it was said that although a right of appeal does not bar the power of a superior court to grant prohibition, and

⁵ A comprehensive analysis is provided in an article by Dame Enid Campbell, 'Judicial Review and Appeals as Alternative Remedies' (1982) 9-10 *Monash University Law Review* 14.

⁶ *Kelly v Coats* (1981) 35 ALR 93, per Toohey J.

⁷ *The King v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Picture Theatres* (1949) 78 CLR 389 at 400. See also *Re Refugee Tribunal; Ex parte Aala* (2000- 2001) 204 CLR 82 per Gaudron and Gummow JJ.

that any such provision would be invalid, the court nonetheless has a discretion to grant or refuse the remedy. Factors enlivening the discretion might include that a decision in favour of one party might render academic whether or not prohibition should issue, or because it would assist the court in discharging its ultimate responsibility. In *Aala*, the Court confirmed prohibition as a discretionary remedy. Relevant factors that might cause the discretion to be exercised adversely to the applicant include "the delay, waiver, acquiescence or other conduct of the prosecutor".⁸

6.15 Other considerations include "the high purposes of vindicating the public law of the Commonwealth, of upholding lawful conduct on the part of officers of the Commonwealth, of defending the rights of third parties under that law, and of maintaining the provisions of the Constitution".⁹

SECTION II

What is an adequate alternative remedy

6.16 In addressing whether or not an alternative to an application under sub-section 10(2) of the AD(JR) Act is 'adequate' it has been said that:

In this context, the adequate provision is to be read as adequate in the sense of suitability or sufficient provision for review.¹⁰

6.17 In determining what constitutes 'adequacy' of the alternate remedy, it would seem that it is proper to compare it with the power of the court under the AD(JR) Act. In the case of *Webb v Jackson*¹¹ for instance, a case commenced in the Supreme Court was considered relevant as it allowed a rehearing of the matter, including the admission of fresh evidence. In that case, it was also considered relevant that five other actions had been brought in the Supreme Court involving the same subject matter. In contrast, a right of review under the *Public Service Act 1922* was considered inadequate as it did not provide the range of remedies available under the AD(JR) Act.¹²

6.18 Some of the factors considered relevant to determining the adequacy or otherwise are set out below.

Nature of the review right

6.19 Factors here include:

⁸ *Re Refugee Tribunal; Ex Parte Aala* (2000) 204 CLR 82, 107 per Gaudron and Gummow JJ.

⁹ *Ibid*, 137 per Kirby J.

¹⁰ *Edelsten v Minister for Health* (1994) 32 ALD 730, 734 per Northrop J.

¹¹ *Webb v Jackson* (1984) 56 ALR 254.

¹² *Inglis v Bateson* (1990) 99 ALR 149.

Nature and scope of review powers

6.20 The nature of review provisions and the scope of the powers entrusted to the review body may be relevant factors in determining their adequacy as alternative review mechanisms.¹³ It has been held by the High Court that where there is a full appeal right, there will be no right of judicial review from the initial decision.¹⁴ However, the appeal needs to be 'full and comprehensive'.¹⁵ In contrast to a right of appeal, recourse to a review tribunal with no rights to reverse or even modify the original decision – will not expunge judicial review for procedural fairness.¹⁶ Similarly, an appeal on a question of law alone is not sufficient.¹⁷

6.21 While an appellate body may have jurisdiction to undertake a *de novo* hearing and review a decision it may not have the power to substitute its own decision for that appealed against, but merely to confirm the decision or else recommend that it be set aside or varied. As such, it would not be an adequate alternative. The remedy on appeal must be a true alternative; that is, if the appeal should succeed, the appellate body must have the power to rectify the error complained of.¹⁸

6.22 Account must also be taken of whether review by appeal is automatic, on request, or whether leave to appeal must be sought and obtained. If establishment of an appeals tribunal and determination of an appeal is discretionary, this would not be a true alternative.¹⁹ The standing or lack of standing of the applicant to the appeal will also be a relevant factor.

6.23 Time limits may also be a factor. A right dependent on the success of an application for extension of the relevant time limit may not be an adequate alternative.

6.24 Whether the onus of proof is on an applicant in an appeal from a decision, when they would not have otherwise have had such an onus, is also a relevant factor.²⁰

¹³ *Brock v Child Support Registrar* (1995) 38 ALD 255.

¹⁴ *Twist v Randwick Municipal Council* (1976) 12 ALR 379; *Marine Hull & Liability Insurance Co Ltd v Hurford* (1985) 62 ALR 253.

¹⁵ *Furnell v Whangarei High School Board* [1973] AC 660.

¹⁶ *Colpitts v Australian Telecommunications Commission* (1988) 14 ALD 554.

¹⁷ *Twist v Randwick Municipal Council* (1976) 12 ALR 379; *Marine Hull & Liability Insurance Co Ltd v Hurford* (1985) 62 ALR 253.

¹⁸ *R v Hull Board of Visitors; Ex parte St Germain* (1979) QB 425, 448 -9, 456, 465.

¹⁹ *R v Town Planning Committee; Ex parte Skye Estate Ltd* [1958] SASR 1, 21, 24, 27-8, 39-40.

²⁰ *Marine Hull v Hurford* (1985) 62 ALR 253, 264. See also *Calvin v Carr* [1980] AC 574.

Discussion point 22

Are the courts sufficiently pro-active in refusing to allow judicial review in the face of other remedies?

Please elaborate.

Timing

6.25 Timing is also important.

Has there already been a hearing?

6.26 In one case, the Federal Court²¹ refused to entertain an application for judicial review on the basis that there had already been a hearing in the AAT. In reaching this conclusion, the Court was influenced by the fact that the AAT could offer:

- full merits review, encompassing law and fact, with the possibility of an appeal to the Federal Court on a question of law; and
- having regard to the Aged Care Act, reconsideration of all the steps taken to reach the ultimate decision and therefore, that proper conduct of a review by the AAT would cure all the defects in the process that led to the ultimate decisions complained of, if there were such defects.

6.27 The Court also noted that its decision as to the adequacy of merits review was not theoretical in view of the fact that the applications had been heard by the Tribunal.

Is the matter in the process of being heard/heard?

6.28 In *Saitta Pty Ltd v Commonwealth*, it was held by Weinberg J at first instance that:

The fact that it has available to it adequate alternative remedies in the AAT in proceedings which it has already commenced provides considerable support for the proposition that the proceedings in this Court should at least be stayed. Where full merits review is available to, and has already been invoked by an applicant, Courts will often exercise their discretion to stay or dismiss applications for judicial review.²²

²¹ *Saitta v Commonwealth* [2001] FCA 817, [25]-[29] per Gray J.

²² *Saitta Pty Ltd v Commonwealth* (2000) FCA 1546.

6.29 In another case, the Court declined to allow an application for judicial review whilst an appeal under section 44 of the *Administrative Appeals Tribunal Act 1975* was under way.²³

Preliminary or procedural decision

6.30 It has been held that if undertaken at too early a point, judicial review may result in a fragmentation of the decision-making process and that this may be detrimental to the efficiency of the system as a whole.²⁴

6.31 The position has also been complicated by the restricted interpretation of 'decision' in *Australian Broadcasting Tribunal v Bond*. In that case, Mason CJ held that a decision is generally but not always, a decision which is final or operative and determinative, at least in a practical sense, of the issue of fact falling for determination.

6.32 There are doubts too as to whether an isolated error at a preliminary stage should invalidate a subsequent or final decision. According to Toohey and Gaudron JJ in *Bond*:

If the decision is to stand because it is not attended by a reviewable error, review of the conclusions and findings leading to that decision to see if they were attended by some error which, *ex hypothesi*, was not carried into the decision so as to render it reviewable is a futile exercise.²⁵

Is an appeal pending?

6.33 It has been held that whether or not the fact that the applicant has chosen to appeal and that his appeal is still pending is a good reason to refuse an applicant a judicial remedy must depend on the status of the appellate body, the nature of the appeal and the grounds on which remedy is sought, for example, appeal to the Minister when not afforded a full hearing – no assurance of oral hearing or legal representation.²⁶

Are there concurrent AAT proceedings?

6.34 In one case,²⁷ it has been observed that where full merits review is available and has been invoked by an applicant, Courts will often exercise their discretion to stay and dismiss judicial review. In that case, it was considered relevant that the AAT could consider questions of law arising in proceedings before it.²⁸ It could therefore consider as part of its consideration

²³ *Anita Chowdhary v Peter Bayne in his capacity as a senior member of the AAT & Comcare* (1999) AAR 100.

²⁴ This is the general tenor of comments made by Mason CJ in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 336-7.

²⁵ *Ibid*, 378.

²⁶ *R v Spalding* (1955) 5 DLR (2d) 374.

²⁷ *Saitta Pty Ltd v Commonwealth* [2000] FCA 1546, [103]-[104] per Weinberg J.

²⁸ By virtue of section 42 of the *Administrative Appeals Tribunal Act 1975*.

of decisions in issue, the validity of the Aged Care Principles. Although unable to exercise judicial power or to grant the declaratory relief sought, it could arrive at a conclusion as to whether or not the steps preceding the making of the sanction decisions were lawful and whether various provisions of the Act were contravened.

6.35 If the presence or absence of jurisdiction depends on questions of fact, and the court against which prohibition has been sought has not yet determined those questions of fact, let alone whether it has jurisdiction, the court may decide the application for review to be premature.²⁹

Was there a delay in instituting proceedings for judicial review?

6.36 In one case,³⁰ delay in bringing proceedings to halt an Inquiry already started under the *Public Service Act 1922* was considered an important factor in denying relief. Assessment of the adequacy of the suggested alternative may not be possible until the strength of the applicant's claim is ascertained.

Public interest element

6.37 In the same case, public interest in the efficient administration of the *Public Service Act 1922* was held to be a factor in refusing relief.³¹

Benefit of court proceeding to applicant

6.38 It has been held in one case that the applicant would not 'suffer any great hardship if [the respondent's] application succeeds' was a relevant consideration.³² It was noted in this regard, in a case not involving pure issues of law but 'at best, mixed questions of fact and law', that although the Anti-Dumping Authority was 'not necessarily constituted by legally qualified members...its practice is to obtain advice from the Australian Government Solicitor on any legal issues raised'.³³

Complexity of the issues

6.39 It was held in one case that:

...given the apparent complexities of this litigation, it is difficult to state in advance of the final hearing what ultimate substantive relief, if any were to be granted, would be the appropriate relief. Until the likely form of that relief is known, it is premature to speculate about the possible existence of discretionary reasons why the Court might, notwithstanding a prima facie entitlement to relief, nonetheless, decline

²⁹ *R v Judges of Federal Court of Australia; Ex parte Western Australian National Football League (Inc)* (1979) 143 CLR 190.

³⁰ *Vickers v Hanks* [1999] FCA 695 per Carr J.

³¹ *Id.*

³² *Re Du Pont (Australia) Limited and E I Du Pont De Nemours and Co and: Comptroller-General of Customs; Peter Kittler; Anti-Dumping "Authority and Minproc Holdings Ltd* (1993) 30 ALD 829, [14]-[15] per Heerey J.

³³ *Ibid*, [16].

to order judicial review. This is particularly so when the true nature and scope of the administrative review now relied upon is not yet fully known.³⁴

Relative cost/speed

6.40 It is relevant, generally speaking, to have regard to any unnecessary delay and any increased cost if the alternative suggested remedy is pursued.³⁵ The desirability of a speedy, authoritative decision may also be an important factor. As noted by Fox ACJ in *Graham v Commissioner of Superannuation*:

The main consideration...is what is best to be done in the interests of the parties and the public interest and with a view to saving cost and time and reaching as soon as possible a finality of decision.³⁶

6.41 It was noted in the case that:

If the matter were not dealt with by the court the applicant could seek reconsideration by the Commissioner and then go the AAT and if the question of law was still decided adversely to her, she might have to come back to the court. The inability an administrative court to make a definitive ruling was held to be a factor in the decision.³⁷

6.42 Expediency was a factor in *Kelly v Coats*, a case involving an error of law, where it was held by Toohey J that the application before the Federal Court '...is likely to be a more expeditious way of disposing of the matter than the procedures to be found in the Repatriation Act'.³⁸

Other judicial consideration in the case

6.43 In one case where judicial consideration had already been undertaken at first instance, the Full Federal Court indicated that it would not be appropriate for the court to exercise the discretion under paragraph 10(2)(b)(ii) of the AD(JR) Act.³⁹

Urgency

6.44 In the case of *Twist v Randwick Municipal Council*, Mason J noted that:

This case related to an appeal to the district court from a demolition order made by the Council. The provision indicated a legislative intention to exclude any hearing prior to the making of the demolition

³⁴ *Moran Hospitals Pty Ltd v Conor King and Paul Huntley* (1997) 49 ALD 444.

³⁵ *Mercantile Credits Ltd v Commissioner of Taxation (No 1)* (1985) 5 FCR 510 followed in *Ross Milton Hagedorn v Department of Social Security* (1996) 44 ALD 274.

³⁶ (1981) 3 ALN N86.

³⁷ *Id.*

³⁸ *Kelly v Coats* (1981) 35 ALR 93, 95.

³⁹ *Swan Portland Cement Limited v Comptroller-General of Customs* (1989) 25 FCR 523.

order. The appeal thereby provided the exclusive remedy. The appeal was a hearing *de novo* – a full and comprehensive one on facts and law.⁴⁰

6.45 In *Du Pont*,⁴¹ it was noted that the regime prescribed under the *Customs Act 1901* contained legislative directions as to the times in which various steps were to be taken and that:

Because of the commercial context in which the questions of alleged dumping arise may change rapidly there is an obvious need, explicitly recognised by Parliament, to have the disputed issues resolved promptly.⁴²

Consequences of the decision

6.46 In *Minister for Immigration and Multicultural Affairs v Miah*,⁴³ in allowing judicial review, McHugh J indicated that the nature of the interest and consequences for the individual, as well as the subject matter of the application were important. In that case, consequences included possible risk to life and were, on that basis, undeniably important.

6.47 Conversely, it has been held by the Federal Court in another case that proceedings under the Public Service Act should proceed under that Act.⁴⁴

Discussion point 23

Are there factors other than those identified in the discussion paper relevant to the circumstances in which remedies will present adequate alternatives to judicial review?

Please elaborate.

Adequate alternative remedy - two case studies

6.48 In view of their success, an overview of the income tax and workplace relations schemes where, in excluding or limiting judicial review, heavy reliance is placed on the availability of remedies alternative to judicial review. Both schemes appear to enjoy both judicial and government support. Details of the two schemes are set out in Appendix 4 to the discussion paper.

⁴⁰ (1976) 136 CLR 106, 113-4.

⁴¹ *Re Du Pont (Australia) Limited and E I Du Pont De Nemours and Co and: Comptroller-General of Customs; Peter Kittler; Anti-Dumping "Authority and Minproc Holdings Ltd* (1993) 30 ALD 829, [14] per Heerey J.

⁴² *Id.*

⁴³ (2001) 206 CLR 57.

⁴⁴ *Beck v Thornett* (1984) 6 ALN N209.

Discussion point 24

Are there particular features of the tax and workplace relations review regimes that set them apart?

Are there other decision-making regimes which might be included here?

Please elaborate.

SECTION III

The grounds of review

6.49 An important factor influencing the court's determination whether to exercise the discretion to allow a judicial review application to proceed to hearing or not can also be the ground of challenge and the consequences flowing from judicial intervention.

Error of law

6.50 There is authority to suggest that where prohibition/certiorari are sought for patent jurisdictional error, a court has no discretion to refuse the writ once the court has determined the nature of the error.⁴⁵ Indeed, when an application is on the ground of no jurisdiction/error of law, the courts have seldom declined to give a remedy merely because the decision is subject to appeal.⁴⁶

6.51 A similar approach prevails under the AD(JR) Act. It has been held for instance that 'assuming that the applicant's complaint is truly one of error of law, the present application [for judicial review] is likely to be a more expeditious way of disposing of the matter than the procedures to be found in the Repatriation Act'.⁴⁷

Procedural fairness

6.52 The factors relevant to refusing relief in the face of an alternative remedy have been identified by McHugh J in *Miah's* case, a case in which it

⁴⁵ *Yirrell v Yirrell* (1939) 62 CLR 287.

⁴⁶ See for example, *Swan Portland Cement Ltd v Comptroller-General of Customs* (1989) 90 ALR 280. *Kelly v Coats* (1981) 3 ALN 52.

⁴⁷ *Ibid*, 96 per Toohey J.

was contended that the right to a full *de novo* review by the Tribunal indicated Parliament's intention to limit the requirements of natural justice at the stage where a delegate is examining the applications. While noting that:

It is true that the existence of appeal or review rights may affect the extent to which the requirements of natural justice apply at an earlier level of decision-making,

6.53 His Honour considered that:

...there is no general rule that a right of appeal or review necessarily denies or limits the application of the rules of natural justice. There is no inflexible rule that the presence of a right of appeal or review excludes natural justice.⁴⁸

6.54 His Honour suggested that the following factors can be relevant in determining whether such a right excludes or limits the rules of natural justice:

- the nature of the original decision: preliminary or final
- whether the original decision is made in public or private
- the formalities required for original decision
- the urgency of the original decision
- the nature of the appellate body - judicial, internal, "domestic"
- the breadth of appeal - *de novo* or limited; and
- the nature of the interest and subject matter.

6.55 In the case at hand, His Honour's view was that the right of appeal to the tribunal was insufficient to conclude that the Parliament intended that the delegate was not required to accord natural justice. Although the *de novo* right of review was important it was not sufficient to outweigh the inference of the subject matter that procedural fairness should lie.

Unreasonableness/irrelevant considerations etc

6.56 It would seem that in cases involving applications on the basis of grounds involving greater focus on fact than law, the courts are more prepared to regard alternative review processes including merits review by a tribunal as 'adequate'.

6.57 This was the case for instance in the Federal Court case of *Meng Kok Te v Minister for Immigration and Ethnic Affairs and Another*⁴⁹ where Branson J held that the alternative process, review by the AAT, involving full merits review, would be an adequate alternative to judicial review and that questions of fact and law could be argued. Moreover, the decision of the AAT following such

⁴⁸ *Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, [145].

⁴⁹ *Meng Kok Te v Minister for Immigration & Multicultural Affairs* (1998) FCA (16 October 1998).

review would be open to be appealed to the Federal Court on the ground of error of law.

Discussion point 25

Do you agree with this assessment?

How do other grounds influence the court's determination of the existence of adequate alternative remedies?

Please elaborate.

SECTION IV

Merits review

The judicial perspective

6.58 As reflected in the above discussion, the courts are prepared in some cases to regard full *de novo* merits review by a tribunal as an adequate alternative remedy. As also noted above, a range of other factors such as the timing of the application, the nature of the decision appealed from and the ground upon which review is sought, are also pertinent.

6.59 In *Brag v Secretary, Department of Employment, Education and Training*,⁵⁰ Davies J expressed the general principle that:

This court is too busy and its processes too costly for it generally to be appropriate for an applicant to come to the court when there is an informal and expeditious administrative tribunal established to resolve the dispute.

and:

We...express the view that in many, (perhaps most) circumstances, the Court's proper response to an application of this particular sort [where the statute establishes a specific appeal mechanism] should not be to embark upon a full hearing, but rather to exercise the discretion under s10(2)(b)(ii) adversely to the applicant.⁵¹

⁵⁰ (1995) 38 ALD 251, 253.

⁵¹ *Swan Portland Cement Ltd v Comptroller-General of Customs* (1989) 25 FCR 523, 530 per Morling, Pincus and O'Loughlin JJ. The Privy Council has also agreed with these sentiments: *Harley Development v*

The executive perspective

6.60 In its report on the *Administrative Decisions (Judicial Review) Amendment Bill 1987*, the Senate Standing Committee on Legal and Constitutional Affairs indicated its sympathy with the considerations underlying the Bill, namely, that where administrative tribunals have been established with jurisdiction to deal with matters in their entirety, such tribunals should resolve those matters, rather than the Court, which may address only questions of law.⁵²

6.61 Establishment of a comprehensive merits review system was considered by the Government to be a significant argument for the limitations on judicial review provided for in the *Migration Reform Act 1992*:

The review procedures established in [the Act] provide for comprehensive merits review of all visa related decisions and in recognition of this, this ground of review will no longer be available.⁵³

6.62 Similarly, it has been remarked in relation to migration visa decisions that:

There is an obligation to provide review, but there is no obligation to provide review both of an administrative character and in relation to providing additional access to the courts. The obligation is to provide one but not both.⁵⁴

6.63 Conversely, in its 32nd report in 1989, when considering the issue of exclusion from review of taxation decisions the Council was of the view that:

...the availability of a comprehensive appeals system does not provide a basis for an exclusion from the AD(JR) Act. The Act specifically contemplates in section 10 that, in certain cases which come before the court on a judicial review application, adequate provision for appeal or review will be made elsewhere. The section provides for exercise of the court's discretion in those circumstances to refuse to grant the judicial review application.

If the main reason for the exclusion is the existence of a right of review on the merits, the consistent line which ought to be taken in the

Commission of Inland Revenue [1996] 1 WLR 727.

⁵² Senate Standing Committee on Legal and Constitutional Affairs, *Administrative Decisions (Judicial Review) Bill 1987*, *Parliamentary Paper No 212*, 1987, paragraphs 4.13-14, 26.

⁵³ Explanatory Memorandum to the *Migration Reform Bill 1992*, paragraph 415. Further, as pointed out by Mason J in *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1986) 162 CLR 24, 42, when the ground of asserted unreasonableness is given too much or too little weight to one consideration or another: '...a court should proceed with caution...lest it exceed its supervisory role by reviewing the decision on its merits.'

⁵⁴ The Hon Philip Ruddock, Minister for Immigration and Multicultural Affairs, Second Reading Speech, *Migration Legislation Amendment Bill (No 4) 1997*, *Hansard*, 25 June 1997, 2.

Commonwealth is that, whenever legislation gives a right of review of a particular class of decision by the AAT, steps ought to be taken to exclude review under the AD(JR) Act. Quite properly, this course is not in fact taken. Section 10 of the AD(JR) Act is in place to deal with alternative remedies.⁵⁵

6.64 As stated by the Law Council of Australia in its submission in 1998 to the Senate Legal and Constitutional Legislation Committee on the *Migration Legislation Amendment (Judicial Review) Bill 1998*.

...there is abundant evidence that the merits review process at the moment is not so efficient and effective that one should be prepared simply to say, by comparison with all the other areas of merits review and primary decision-making at the federal level that this one should be subject to only the lightest touches of judicial review....what sets apart the proposed privative clause in the Judicial Review Bill is that it would operate to protect the rulings of bodies that do not have the status of courts but which nevertheless make findings that typically involve issues of both fact and law...⁵⁶

6.65 Further, in oral evidence before the Committee, the Australian Law Reform Commission said that:

It seems to be a misguided belief that judicial review is some alternative to merits review, particularly when the form of merits review is as fined down and sparse as the RRT process is, covering what are in many cases some of the most difficult fact finding, judgmental and legal conundrums that any decision-maker at the federal level is faced with.⁵⁷

6.66 In the context of the same report, the Commonwealth Ombudsman noted that:

It is...questionable that merits review could ever be a substitute for judicial review in relation to dealings with technical legal arguments and the provision of precedent and guidance to tribunal members.⁵⁸

⁵⁵ Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act*, Report No 32, 1989, paragraphs 268 and 270.

⁵⁶ Submission of the Law Council of Australia to the Senate Legal and Constitutional Legislation Committee Inquiry into the *Migration Legislation Amendment Bill (No 2) 1998*, *Migration (Visa Application) Charge Amendment Bill 1998* and *Migration (Judicial Review) Bill 1998*, 18 January 1998, paragraph 12.4.

⁵⁷ Australian Law Reform Commission in 'Transcript of Evidence' in *Senate Legal and Constitutional Legislation Committee Consideration of Legislation Referred to the Committee* (ed), *Migration Legislation Amendment (Judicial Review) Bill 1998*, 1998, paragraph 2.80.

⁵⁸ Submission of the Commonwealth Ombudsman to the Senate Legal and Constitutional Legislation Committee Inquiry into the *Migration Legislation Amendment Bill (No 2) 1998*, *Migration (Visa Application) Charge Amendment Bill 1998* and *Migration (Judicial Review) Bill 1998*, 18 January 1998, 14.

Previous Council consideration

6.67 In seeking exclusion in 1978 from the ambit of the AD(JR) Act, some agencies argued that the existence of adequate alternative avenues of review is relevant to determining whether classes of decisions should be excluded from the Act.

6.68 In its first report in 1977 on the *Administrative Decisions (Judicial Review) Act 1977*, the Council said that:

Review under the Act relates only to unlawfulness, whereas alternative remedies suggested as adequate (such as appeals to the Administrative Appeals Tribunal) generally relate to the merits of the decision in question. While individuals may regard review on the merits as more desirable than judicial review in most situations, there will be cases in which judicial review is preferable.

...

Judicial review by the Federal Court is part of a comprehensive administrative review structure which includes the Administrative Appeals Tribunal and the Ombudsman. There can be an overlapping of jurisdiction of the three main review bodies in some areas. But this is an integral part of the structure...and the three avenues of review can operate consistently. Accordingly, the existence or non-existence of review by the Tribunal or Ombudsman is neutral in any argument based on alternative remedies, and does not justify any exclusion from the Act.⁵⁹

6.69 The Council rejected the argument from agencies that the existence of alternate remedies justified total exclusion from the AD(JR) Act, noting that section 10 of the Act explicitly provides that the AD(JR) Act rights are additional to other existing remedies.

6.70 In its report, the Council also noted that:

Judicial review is a basic remedy in administrative review, for it is the primary means of ensuring that administrative action is subject to the rule of law. Hence the existence of an alternative remedy is not in itself a substitute for judicial review. Generally speaking an alternative remedy becomes relevant only where there are other principles which support exclusion from the Act and where the alternative remedy could properly be regarded as compensating for the consequences of exclusion.⁶⁰

6.71 Subsequently in its 26th Report in 1986, *Review of Administrative Decisions (Judicial Review) Act 1977 – Stage 1*, the Council looked, at the issue of

⁵⁹ Administrative Review Council, *Administrative Decisions (Judicial Review) Act 1977: Exclusions under Section 19*, Report No. 1, 1977, paragraphs 52, 54, 28-9.

⁶⁰ *Ibid*, paragraph 55.

overlapping remedies, recommending that the Court's discretion to stay or refuse to grant an application for review of a decision should be capable of exercise at any stage of the proceedings and should be exercised at the outset of proceedings wherever appropriate although only in a preliminary way.⁶¹

6.72 As noted above, while taking into account the recommendations made in the Report, the *Administrative Decisions (Judicial Review) Amendment Bill 1987* went further than this.

6.73 In its 32nd report in 1989, *Review of the Administrative Decisions (Judicial Review) Act: the Ambit of the Act*, the Council suggested that:

The aim [of government] should be to ensure that judicial review is not the only avenue of challenge of decisions but performs its intended role of providing a remedy of last resort.⁶²

6.74 In the Report, the Council recommended that the AD(JR) Act should be amended by provisions along the lines of the *Administrative Decisions (Judicial Review) Amendment Bill 1987* and that the Bill should be amended by substituting words along the following lines for the concluding words of proposed paragraph 10(2)(c):

...the Court shall refuse to grant the application if it is satisfied, having regard to the interests of justice, that the alternative review right is, in all the circumstances, adequate.⁶³

The Council also recommended that the concluding words of proposed paragraph 10(2)(d) of the Bill should be amended to read:

...the Court shall refuse to grant the application if it is satisfied, having regard to the interests of justice, that it should do so.⁶⁴

6.75 In relation to overlapping judicial remedies, the Council noted that:

To the extent that, in some areas of the Commonwealth administration, there exists side by side with rights under the AD(JR) Act a right of appeal, or to make other application to the courts...the operation of the AD(JR) Act as one fork of a bifurcated review path needs to be considered.⁶⁵

⁶¹ Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act 1977 – Stage One*, Report No 26, 1986, paragraphs 47, 92.

⁶² Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act*, Report No 32, 1989, paragraph 26.

⁶³ *Ibid*, paragraph 363 and Recommendation 15.

⁶⁴ *Id*.

⁶⁵ Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act*, Report No 32, 1989, paragraph 447.

6.76 In its deliberations, the Council noted that a right of appeal is wider than a review right as, unless restricted to issues of law, it will allow review on matters of law and the merits.

6.77 In *What Decisions Should be Subject to Merits Review?* the Council considered that the preliminary nature of some decisions was a factor justifying excluding merits review, in the following terms:

This is because review of preliminary or procedural decisions may lead to the proper operation of the administrative decision-making process being unnecessarily frustrated or delayed. In the case of preliminary or procedural decisions, the beneficial effect of merits review is limited by the fact that such decisions do not generally have substantive consequences. The benefits are outweighed by the cost of potentially frustrating the making of substantive decisions.⁶⁶

6.78 More recently, the Council has said that:

While the Council supports the use of independent merits review tribunals, it is not of the view that the existence of merits review in any way justifies the removal of judicial review or the removal of appeal rights under section 44 of the *Administrative Appeals Tribunal Act 1975*.

...

In the Council's view, the preferable approach would be to legislate to give courts clear power and authority to strike out proceedings for judicial review at a preliminary hearing, unless the court was satisfied, at that stage, that there was a bona fide issue as to the legality of the tribunal's proceedings or decision. Under this proposal, courts could be required, in each application for judicial review of a decision, to consider whether or not to exercise this power.⁶⁷

Discussion point 26

In what circumstances should the availability of full merits review be sufficient to displace an application for judicial review?

Please elaborate.

⁶⁶ At paragraph 4.4.

⁶⁷ Extract from the Council's submission to the Senate Legal and Constitutional Legislation Committee Inquiry into the *Migration Legislation Amendment Bill (No 2) 1998*, *Migration (Visa Application) Charge Amendment Bill 1998* and *Migration Legislation Amendment (Judicial Review) Bill 1998*, 18 January 1998.

Concluding comments

6.79 Having regard to the preceding discussion, it is apparent that there are circumstances where judicial review might appropriately be supplanted in the face of an adequate alternative remedy. Moreover, there are circumstances where full merits review by a tribunal, as well as a right of appeal to a court, will be regarded as 'adequate' for this purpose.

6.80 As reflected in the preceding paragraphs, the circumstances in which an alternative remedy may be regarded as 'adequate' are multifarious. As illustrated in the tax and workplace relations areas, some of these circumstances can be actively anticipated and provided for through the provision of comprehensive complaint handling and alternate review processes. In the tax area, for instance, merits review is supplemented but not supplanted by a comprehensive objection and review stage, the rulings process and a full appeal right.

6.81 In situations where grounds such as procedural fairness and unreasonableness form the basis of an application for judicial review, the better response may be that a full merits review can provide an adequate alternative to judicial review. In the case of a claim of bias for instance, it will be the task of the tribunal to undertake a full and unbiased hearing of the application.

6.82 In the case of a ground such as unreasonableness, where, as discussed earlier, there is a strong likelihood that the 'mischief' complained of, the unreasonableness, will be cured by the review process the arguments for merits as opposed to judicial review are pertinent.

6.83 Arguably, the issue becomes more pointed in circumstances where a tribunal is an expert tribunal and the subject matter of the decision is of a technical and complicated matter. The workplace relations area is a case in point.

6.84 Other relevant factors include the quality of the decision-making body and the powers of the decision-making body.

6.85 In situations where other grounds of review are likely to be relied on, where there is not full merits review or where issues of error of law are involved, the right to judicial review may be the preferred option. In such circumstances, though not all review options have been employed, it may still be preferable to permit judicial review. It has been said for instance, that:

There is no reason for driving the subject to that expensive process (ie appeal) to abide by the chance of repetition of error, which, if committed, can, at least, be one rectified by prohibition, and may be so committed as to be placed beyond the reach of even that remedy; or for

compelling him to submit even to that direct inconvenience arising from that decision alone, if none lay beyond him.⁶⁸

Discussion point 27

Do you agree/not agree with these views?

Are there any other relevant considerations?

Please elaborate.

⁶⁸ *Burder v Varley* (1840) 12 Ad & E 233.

PART VII - HOW MIGHT JUDICIAL REVIEW APPROPRIATELY BE LIMITED

INTRODUCTION

SECTION I

The underlying constitutional framework
The uncertain effect of privative clauses
General principles relating to the legislative removal of rights
Removal of rights and judicial review

SECTION II

The need for clarity and specificity

The need for clarity

The need for specificity

INTRODUCTION

7.1 Much of this discussion paper has been devoted to examining the circumstances, if any, in which limitations might appropriately be imposed on the scope of judicial review.

7.2 The purpose of this final Part is to consider the way in which any limitations on judicial review might appropriately be imposed: the focus has shifted from 'when' to 'how'.

SECTION I

The underlying constitutional framework

7.3 The constitutional doctrines of the rule of law and the separation of powers to which reference has been made in Part III find particular expression in section 75(v) of the Constitution. That section confers original jurisdiction on the High Court in all matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.

7.4 Those doctrines and section 75(v) in particular place a significant constraint on the capacity of parliament to limit the scope of judicial review. As Dixon J pointed out in *R v Hickman; Ex parte Fox and Clinton*:

It is, of course, quite impossible for the Parliament to give power to any judicial or other authority which goes beyond the subject matter of the legislative power conferred by the Constitution. ... It is equally impossible for the legislature to impose limits upon the quasi-judicial authority of a body which it sets up with the intention that any excess of authority means invalidity, and yet, at the same time, to deprive [the High Court] of authority to restrain the invalid action of the court or body by prohibition.¹

7.5 The point was reiterated in *Plaintiff S157/2002 v Commonwealth of Australia* where five members of the High Court stated:

The reservation to this Court by the Constitution of the jurisdiction in all matters in which the named constitutional writs or an injunction are sought against an officer of the Commonwealth is a means of assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them. The centrality, and protective purpose, of the jurisdiction of this Court in that regard places significant barriers in the way of legislative attempts (by privative clauses or otherwise) to impair judicial review of administrative action.²

7.6 Nevertheless, subject to the overriding requirement that the subject matter of the law lie within Commonwealth legislative power,³ it appears to remain open to parliament so to define the powers of a decision-maker as to exclude at least most of the traditional grounds of judicial review.

The uncertain effect of privative clauses

7.7 The principal means by which parliament has in the past sought to limit judicial review has been through the use of privative clauses.

7.8 As traditionally construed in Australia, such clauses have been read not as purporting to limit the role of the courts but as expanding the powers of a decision-maker. This approach to construction, based on the *Hickman* principle, makes it difficult to identify or predict their meaning with any real certainty.⁴

¹ (1945) 70 CLR 598, 616.

² [2003] HCA 2, [104].

³ *Ibid*, [102].

⁴ An example of this is the High Court's decision in *Plaintiff S157/2002 v The Commonwealth of Australia* [2003] HCA 2 where the Court unanimously held that the privative clause and time limit clause in the *Migration Act 1958* were Constitutionally valid but construed them so narrowly so as to significantly reduce their effect. The privative clause was not considered clear enough to prevent judicial review of an administrative decision involving jurisdictional error and, specifically, involving contravention of the rules of natural justice.

General principles relating to legislative removal of rights

7.9 As a general principle, there is considerable authority, both within Australia and elsewhere, in support of the view that where rights are taken away by legislation, this should be done transparently and unambiguously.

7.10 This view accords with principles of drafting legislation in plain English so that a person's rights and obligations are clear on the face of the legislation. Such an approach also accords with the settled statutory rule of construction that if parliament is to enact a law that takes away common law rights or principles then it must clearly say so. As noted by Deane J in the High Court case of *Baker v Campbell*:

...it is a settled rule of construction that general principles of a statute should only be read as abrogating common law *principles* or rights to the extent made necessary by express words or necessary intendment...It is to be presumed that if the Parliament intended to authorise the impairment or destruction of that confidentiality by administrative action it would frame the relevant statutory mandate in express and unambiguous terms. [emphasis added]⁵

7.11 A further enunciation of this principle is to be found in another decision of the High Court, *Coco v The Queen*.⁶ In that case, which involved consideration of Queensland legislation providing for authorisation of entry onto premises to install listening devices in circumstances where the entry would otherwise have constituted unlawful trespass, Mason CJ, Brennan, Gaudron and McHugh JJ said as follows:

Statutory authority to engage in what otherwise would be tortious conduct must be clearly expressed in unmistakable and unambiguous language. Indeed, it has been said that the presumption is that, in the absence of express provision to the contrary, the legislature did not intend to authorise what would otherwise have been tortious conduct.⁷

7.12 Their Honours also observed that courts 'should not impute to the legislature an intention to interfere with fundamental rights' and that any such intention must be 'clearly manifested by unmistakable and unambiguous language'⁸ and that for this purpose:

General words will rarely suffice for that purpose if they do not specifically deal with the question because in the context in which they

⁵ (1983) 153 CLR 52, 116-7 per Deane J. This case was concerned with whether section 10 of the *Crimes Act 1914* displaced legal professional privilege; see also *Sorby v Commonwealth* 152 CLR 281, 309-310; *Goldberg v Ng* (1995) 185 CLR 83, 93-94 per Deane, Dawson and Gaudron JJ; 121, per Gummow.

⁶ (1994) 179 CLR 427.

⁷ *Ibid*, 436.

⁸ *Ibid*, 437.

appear, they will often be ambiguous on an aspect of the interference with fundamental rights.⁹

7.13 However:

...the presumption is rebuttable and will be displaced if there is a clear implication that authority to enter or remain upon private property was intended. Such an implication may be made, in some circumstances, if it is necessary to prevent the statutory provision from becoming inoperative or meaningless.¹⁰

7.14 A similar approach is reflected in a recent decision of the House of Lords, in *Reg v Special Commissioner; Ex parte Morgan Grenfell*, a case relating to legal professional privilege, where it has been said that:

...the courts will ordinarily construe general words in a statute, although literally capable of having some startling or unreasonable consequence, such as overriding fundamental human rights, as not having been intended to do so. An intention to override such rights must be expressly stated or appear by necessary implication.¹¹

7.15 In *NAAV v Minister for Immigration and Multicultural Affairs*, a case involving the validity of a privative clause in the *Migration Act 1958*, French J (in the minority) observed that:

Clear language is expected as an indication of parliamentary intention to abridge or extinguish fundamental rights or liberties.¹²

7.16 The desirability of legislative transparency and accountability in the context of common law freedoms has been noted in *Coco v The Queen*:

...curial insistence on a clear expression of an unmistakable and unambiguous intention to abrogate or curtail a fundamental freedom will enhance the parliamentary process by securing a greater measure of attention to the impact of legislative proposals on fundamental rights.¹³

7.17 In the United Kingdom, this principle is an element of what is known as the 'principle of legality'. The principle involves a presumption that broad discretionary powers will be interpreted by the courts to be subject to fundamental common law rights unless the parliament clearly states

⁹ Id.

¹⁰ Id.

¹¹ [2002] UKHL 21, [8] per Lord Hoffmann. See also judgment of Lord Hobhouse [45].

¹² (2002) ALD 1, [447].

¹³ (1994) 179 CLR 427, [436-437] per Mason CJ, Brennan, Gaudron and McHugh JJ.

otherwise.¹⁴ In this context, Lord Hoffman in *R v Secretary of State for the Home Department; ex parte Simms* has observed that:

Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. ... The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language of necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.¹⁵

7.18 In the context of suggesting that the Australian legislature should clearly state whether it intends to abrogate the fundamental principle of legal professional privilege, Dawson J has noted that:

...it does not seem to me that the law should ease the way for the legislature to expand the practice nor should it disguise the fact that a principle which the law regards as fundamental is involved.¹⁶

Removal of rights and judicial review

7.19 On one view, traditional principles of judicial review are fundamental principles that are akin to 'fundamental common law rights', and as such, the same rules of statutory construction should apply when interpreting judicial review principles. That is, they are to be treated as applicable to an exercise of statutory power in the absence of clear legislative language that they are to be removed.

7.20 In *Plaintiff S157/2002 v Commonwealth of Australia*,¹⁷ a case involving the Constitutional validity of a privative clause in the *Migration Act 1958*, Gleeson CJ referred with approval to the excerpt from the judgment of Lord Hoffman referred to above, noting that:

Courts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is

¹⁴ *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 69 ALD 1, [448] per French J referring to Dyzenhaus, Hunt and Taggart, 'The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation' (2001) 1 *Oxford University Commonwealth Law Journal* 5.

¹⁵ [2000] 2 AC 115, 131

¹⁶ *Baker v Campbell* (1983) 153 CLR 52, 131. See also *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* [2002] HCA 49 where Gleeson CJ, Gaudron, Gummow and Hayne JJ suggest that legal professional privilege is a common law right or immunity and that statutory provisions should not be construed as abrogating it in the absence of clear words or necessary implication to that effect [11].

¹⁷ [2003] HCA 2.

clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose. What courts will look for is a clear indication that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment.¹⁸

7.21 This case related to an issue of procedural fairness. Other cases also support the view that this right is fundamental to good administration. The importance of the doctrine is evidenced by the willingness of courts to require that decision-making be in accordance with natural justice despite there being no positive statutory provisions requiring this:

...a long course of decisions...establish that, although, there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature.¹⁹

7.22 The importance of natural justice is also evidenced in the strong presumption that a privative clause will not be effective to exclude judicial review, especially where there has been a breach of natural justice.²⁰

7.23 Similarly, simply seeking to establish a comprehensive code of procedure which ousts natural justice is not sufficient.²¹ A majority of the High Court in *Minister for Immigration and Multicultural Affairs v Miah*²² held that to exclude the common law natural justice rules a clear legislative intention is required. In the circumstances of that case, it was held that there was no such clear intention.

7.24 In *Annetts v McCann*, it was said that:

It can now be taken as settled, that when a statute confers power upon a public official to destroy, defeat or prejudice a person's rights, interests or expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of necessary intendment.²³

7.25 The expectation that the legislature intends that administrative decisions made under legislation must be exercised in a reasonable manner

¹⁸ *Ibid*, at paragraph 30 referring to *Coco v The Queen* (1994) 179 CLR 427, 437 per Mason CJ, Brennan, Gaudron and McHugh; *R v Home Secretary; Ex parte Simms* [2000] 2 AC 115, 131 and *Annetts v McCann* (1990) 170 CLR 596, 598 per Mason CJ, Deane and McHugh JJ.

¹⁹ *Cooper v The Board of Works for the Wandsworth District* (1863) 3 ER 414, 418 per Byles J.

²⁰ *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.

²¹ *Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 55.

²² *Id.*

²³ *Annetts v McCann* (1990) 170 CLR 596, 598 per Mason CJ, Deane and McHugh JJ.

and that there will be a reasonable assessment of the jurisdictional facts of the case are also principles that are central to good administration.²⁴

7.26 Arguably, these traditional principles of administrative law should be regarded as being of the same nature as fundamental common law rights in that parliament ought to be required to use express words to exclude them.²⁵

7.27 In *Miah*, Kirby J observed that:

[O]rdinary presumptions which run so deep in the common law may be given effect. In the absence of the clearest possible indication to the contrary, courts will normally assume that an Australian parliament does not intend to work serious procedural injustice upon persons whose interests are adversely affected by legislation. This is not a presumption that challenges the authority of such parliaments. It is one respectful of the assumption that, in Australia, parliaments act justly and expect the repositories of power under legislation to do likewise.²⁶

SECTION II

The need for clarity and specificity

The need for clarity

7.28 As a general principle of administrative justice, it is suggested that provisions which take away the right to review of administrative decisions should be clearly stated, their effects apparent on their face and focus on the ambit of the power conferred rather than on the extent to which a court is precluded from examining an exercise of power. In *NAAV v Minister for Immigration and Multicultural Affairs*, French J (in the minority) noted that:

In a representative democracy those who are subject to the law, those who invoke it and those who apply it are entitled to expect that it means what it says. That proposition informs the approach of courts to the interpretation of laws in taking as their starting point the ordinary and grammatical sense of the words:

“that rule is dictated by elementary considerations of fairness, for, after all, those who are subject to the law’s commands are entitled to conduct themselves on the basis that those commands have meaning and effect according to ordinary grammar and usage.”²⁷

²⁴ *Kruger v The Commonwealth* (1997) 190 CLR 1, 36, per Brennan and *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611, 650 per Gummow; *R v Connell*; *Ex parte The Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407, 430, 432, per Latham CJ.

²⁵ Stephen Gageler ‘The Underpinnings of Judicial Review of Administrative Action: Common law or Constitution?’ (2000) 28(2) *Federal Law Review* 303, 313.

²⁶ *Minister for Immigration and Multicultural Affairs: Ex parte Miah* (2001) 206 CLR 55, [192]. *R v Anderson*; *Ex parte Ipec-Air Pty Ltd* (1965) 133 CLR 177, 189 per Kitto quoted in *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507, [62] per Gleeson CJ and Gummow J.

²⁷ (2002) 69 ALD 1 at [430] citing *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319, 340 per

7.29 Such an approach ensures that a person's rights and obligations are apparent on the face of the legislation which is desirable from a policy perspective. This is consistent with principles of drafting legislation in plain English, and principles of transparency and governmental accountability. This approach avoids the need for the judiciary to reconcile the apparent inconsistency between statutory limitations on decision-making powers and the exclusion of judicial review of those powers by way of privative clause.

7.30 It is also consistent with the presumption against interference with common law rights and principles (see above).

The need for specificity

7.31 As an important companion to this view it is suggested that in so far as it may seek to limit judicial review, parliament should do so with reference to particular decision-making powers.

7.32 In view of the range and nature of decisions that may be made by administrators, sometimes within the boundaries of a single piece of legislation, it is important for limitations on judicial review to be directed at specific decision-making processes.

7.33 Couching limitations in clear language but not seeking to anchor them to specific areas of decision-making is to encourage uncertainty and, necessarily, to invite the intervention of the courts in the interpretative process.

7.34 As suggested throughout the discussion paper, judicial review is an important tool in the protection of individual rights in the face of the vast range of government administrative decision-making. It is suggested that to diminish or remove this right, it should be incumbent on parliament to do so with both transparency of purpose and with certainty of effect.

Discussion point 28

Do you agree/not agree with these views?

Are there any other relevant considerations?

Please elaborate.

APPENDIX 1

ADMINISTRATIVE DECISIONS (JUDICIAL REVIEW) ACT 1977

SCHEDULE 1

Section 3

(a) decisions under the Conciliation and Arbitration Act 1904 or the Workplace Relations Act 1996;

(b) decisions under the Commonwealth Banks Act 1959;

(c) decisions under the *Coal Industry Act 1946*, other than decisions of the Joint Coal Board;

(d) decisions under any of the following Acts:

Australian Security Intelligence Organisation Act 1956

Intelligence Services Act 2001

Australian Security Intelligence Organisation Act 1979

Inspector-General of Intelligence and Security Act 1986

Telecommunications (Interception) Act 1979

Telephonic Communications (Interception) Act 1960;

(da) a privative clause decision within the meaning of subsection 474(2) of the *Migration Act 1958*;

(e) decisions making, or forming part of the process of making, or leading up to the making of, assessments or calculations of tax, charge or duty, or decisions disallowing objections to assessments or calculations of tax, charge or duty, or decisions amending, or refusing to amend, assessments or calculations of tax, charge or duty, under any of the following Acts:

A New Tax System (Goods and Services Tax) Act 1999

A New Tax System (Luxury Car Tax) Act 1999

A New Tax System (Wine Equalisation Tax) Act 1999

Australian Capital Territory Taxation (Administration) Act 1969

Debits Tax Administration Act 1982

Coal Excise Act 1949

Customs Act 1901

Customs Tariff Act 1995

Excise Act 1901

Fringe Benefits Tax Assessment Act 1986

Income Tax Assessment Act 1936

Income Tax Assessment Act 1997

Pay-roll Tax Assessment Act 1941

Pay-roll Tax (Territories) Assessment Act 1971

Petroleum Resource Rent Tax Assessment Act 1987

Acts providing for the assessment of sales tax

Superannuation Guarantee (Administration) Act 1992

Taxation Administration Act 1953, but only so far as the decisions are made under Part VI of that Act

Training Guarantee (Administration) Act 1990

Trust Recoupment Tax Assessment Act 1985

Wool Tax (Administration) Act 1964

(ea) decisions of the Commissioner of Taxation under Subdivision B (except subsection 222AGF(3)) of Division 8 of Part VI of the *Income Tax Assessment Act 1936*;

Note: Subdivision B deals with the making, reduction and revocation of estimates of certain liabilities.

(f) decisions of the Commissioner of Taxation under subsection 3E(1) of the *Taxation Administration Act 1953*;

(g) decisions under Part IV of the *Taxation Administration Act 1953*;

(ga) decisions under section 14ZY of the *Taxation Administration Act 1953* disallowing objections to assessments or calculations of tax, charge or duty;

(h) decisions under the *Foreign Acquisitions and Takeovers Act 1975*;

(ha) decisions of the Minister under Division 1 of Part 7.4 of the *Corporations Act 2001*;

(hb) decisions of the SEGC under Part 7.5 of the *Corporations Act 2001*;

(j) decisions, or decisions included in a class of decisions, under the Banking (Foreign Exchange) Regulations in respect of which the Treasurer has certified, by instrument in writing, that the decision or any decision included in the class, as the case may be, is a decision giving effect to the foreign investment policy of the Commonwealth Government;

(l) decisions of the National Labour Consultative Council;

(o) decisions under the *Defence Force Discipline Act 1982*;

(p) decisions under section 42 of the *Customs Act 1901* to require and take securities in respect of duty that may be payable under the *Customs Tariff (Anti-Dumping) Act 1975*;

(q) decisions under subsection 25(1) or Part IIIA of the *Commonwealth Electoral Act 1918*;

(r) decisions under the *Extradition Act 1988*;

(s) determinations made by the Child Support Registrar under Part 6A of the *Child Support (Assessment) Act 1989*;

(t) decisions under an enactment of Qantas Airways Limited or a company that is a subsidiary of that company;

(u) decisions of Snowy Mountains Engineering Corporation Limited or a body corporate that is a subsidiary of that body corporate;

(v) decisions of CSL Limited or a company that is a subsidiary of that company;

(w) decisions under the Witness Protection Act 1994;

(x) decisions under subsection 60A(2B) of the *Australian Federal Police Act 1979*;

(xa) decisions to prosecute persons for any offence against a law of the Commonwealth, a State or a Territory;

Note: An application under this Act in relation to other criminal justice process decisions cannot be heard or determined in certain circumstances: see section 9A.

(y) decisions of the Administrative Appeals Tribunal (other than decisions made on review of decisions of the Australian Archives) made on a review that is required by the *Administrative Appeals Tribunal Act 1975* to be conducted by the Security Appeals Division of that Tribunal;

(za) decisions under Part VIII B of the *Judiciary Act 1903* (which relates to the Australian Government Solicitor).

APPENDIX 2

LEGISLATIVE LIMITATIONS ON REVIEW

Clauses of the following varieties are generally regarded as privative clauses:

1. Clauses which seek to make orders, awards or other determinations final
2. Clauses forbidding the courts from granting the remedies traditionally used by them for judicial review, such as certioari, prohibition or mandamus

Section 150 of the *Workplace Relations Act 1996* is illustrative of both these techniques. It reads as follows:

- (1) Subject to this Act, an award (including an award made on appeal):
 - (a) is final and conclusive;
 - (b) shall not be challenged, appealed against, reviewed, quashed or called in question in any court; and
 - (c) is not subject to prohibition, mandamus or injunction in any court on any account.
- (2) An award is not invalid because it was made by the Commission constituted otherwise than as provided by this Act.

Sub-section 474(1) of the *Migration Act* is couched in similar terms.¹

Section 177 of the *Income Tax Assessment Act 1936* also seeks to exclude judicial review by making the decision final and by excluding judicial challenge. It reads:

The production of a notice of assessment, or of a document under the hand of the Commissioner, a second Commissioner, or a Deputy Commissioner, purporting to be a copy of a notice of assessment, shall be conclusive evidence of the due making of the assessment and, except in proceedings under Part IVC of the *Taxation Administration Act 1953* on a review or appeal relating to the assessment, that the amount and all the particulars of the assessment are correct'.

3. Clauses expressly stating that judicial review lies only on stipulated grounds

Section 5 of the *AD(JR) Act* does this in describing the grounds on which review shall be permissible under that Act. Additionally, review is limited to

¹ Other examples of such clauses are to be found, for example, in section 41 of the *Defence (Re-Establishment) Act 1965*; section 7 of the *Independent Schools (Loan Guarantee) Act 1967* and section 48 of the *Commonwealth Electoral Act 1918*.

administrative decisions under an enactment and does not extend to decisions by the Governor-General.²

Another example is provided by former section 166LA of the Migration Act which defined what were judicially reviewable decisions for the purposes of that Act. Application for review could not be brought on the grounds of unreasonableness, failure to take into account relevant or taking into account irrelevant considerations, bad faith or breach of natural justice and actual bias replaced reasonable apprehension of bias as a ground of review. The 'no evidence' rule was restricted and the error of law and improper exercise of power grounds could also be restricted.

Subsection 500A(ii) of the Migration Act, relating to the refusal or cancellation of temporary safe haven visas, provides that:

The rules of natural justice, and the code of procedure set out in subdivision AB of Division 3 of Part 2 do not apply to a decision under subsection (1) or (3),

while subsection 36(B)(5) of the *Native Title Act 1993* provides that:

If the relevant Minister complies with subsection (1) there is no requirement for any person to be given any further hearing before the relevant Minister makes the determination.

4. Clauses prescribing time limits beyond which there can be no judicial review³

For instance, subsection 11(3) of the AD(JR) Act imposes a 28 day time limit on lodgement of applications for review with the Federal Court or the Federal Magistrates Court.

Section 486A of the Migration Act provides that:

- (1) an application to the High Court for a writ of mandamus, prohibition or certiorari, or an injunction or a declaration in respect of a privative clause decision must be made to the High Court within 35 days of the actual (as opposed to deemed) notification of the decision.
- (2) The High Court must not make an order allowing or which has the effect of allowing, an applicant to make an application mentioned in subsection (1) outside that 35 day period.

² In Report No 32, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act*, 1989, the Council recommended the extension of the Act to the Governor-General, recommendation 2.

³ Provided they are reasonable, such limits have been ruled valid by the courts. See for instance *Yong Jun Qin v Minister for Immigration and Multicultural Affairs* (1997) 144 ALR 695 and *Hong v Minister for Immigration and Multicultural Affairs* (1998) 82 FCR 468.

Other ways in which judicial review may be limited

Other ways in which judicial review may be limited by way of legislative provision include:

5. Clauses giving a decision-making body very wide jurisdiction

For instance, it can be required as a pre-condition to the valid exercise of decision-making power, that a decision-maker formulate a view as to the existence or otherwise of a certain state of facts. The more subjective the power, the less likely it is that its limits will be breached.⁴ Grounds such as unreasonableness, no evidence and relevant and irrelevant considerations remain available only in theory in such circumstances while grounds such as fraud and improper purposes, while subsisting, are very difficult to prove.

An example of such a provision is sub-section 14 *Financial Sector (Shareholdings) Act 1998* which provides that:

If the applicant satisfies the Treasurer that it is in the national interest to approve the applicant holding a stake in the company of more than 15%, the Treasurer may grant the application.

Although judicial review of such decisions is not precluded, it is severely limited by both the subjectivity of the determination of what constitutes 'national interest' and by possible concern as to the appropriateness of courts embarking upon a consideration of such a policy-laden and subjective issue.

Another example of such a provision is sub-section 23(1) of the *Australian Heritage Commission Act 1975*:

Subject to this section, where the Commission considers that a place that is not in the Register should be recorded as part of the national estate it shall enter the place in the Register.

Relevantly also, this Act places decision-making power essentially in the hands of an expert body, sub-section 12(4) of the Act providing that

The Commissioners, other than the representative Commissioners, shall be persons having qualifications relevant to, or special experience or interest in, a field related to the functions of the Commission.

⁴ It has been held that, in the exercise of such discretion inclusion of qualifying words such as 'reasonable' effectively limit the scope of the discretion and provide an opening for judicial review. See *Liversidge v Anderson* [1942] AC 206.

6. Clauses providing protection for a body's decisions or purported decisions, or providing that anything that the body does shall have effect as if enacted by parliament

An example of the former is provided by section 175 of the *Income Tax Assessment Act 1936* which states that:

The validity of any assessment shall not be affected by reason that any of the provisions of this Act have not been complied with.

Similar provision is made by section 87 of the *Reserve Bank Act 1959*:

The validity of an act or transaction of the Bank shall not be called in question in any legal proceedings on the ground that any provision of this Act has not been complied with.

Couched in slightly different terminology, sub-section 89(2) of the *Export Finance and Insurance Corporation Act 1991* provides that:

The effect of a transaction entered into by EFIC [the Export Finance and Insurance Corporation] may not be called into question merely because:

- (a) a provision of this Act has been contravened in relation to the transaction; or
- (b) the transaction is not within the limits of EFIC's powers.

Other examples of such provisions include section 16 of the *National Crime Authority Act 1984* and section 66 of the *Fisheries Act 1991*.

There are also many clauses of this kind in relation to appointments: for instance, section 10 of the *Defence Force Retirement and Death Benefits Act 1973*⁵ provides that:

The validity of the appointment...shall not be called into question by reason only of a defect or irregularity in connection with the nomination of the member or deputy member.

An example of a clause providing that anything that the body does shall have effect as if enacted by Parliament is section 7 of the *Papua New Guinea Loans Guarantee Act 1974* which provides, that:

A provision of a guarantee or of an agreement to which a guarantee relates...has effect as if enacted by this Act and operates

⁵ Other examples of this type of exclusion appear, for example, in section 14 of the *National Museum of Australia Act 1980*; section 11 of the *Australian War Memorial Act 1980*; section 19 of the *Constitutional Convention (Election) Act 1997* and section 120 *Disability Discrimination Act 1992*.

notwithstanding anything in any law of Australia or of a State or Territory whether passed or made before the commencement of this Act.

7. By including evidentiary clauses deeming all things done and that a certain result has been achieved on production of a certificate, or other formal proof of proper form

Sub-section 177(1) of the Income Tax Assessment Act is illustrative, providing that:

The production of a notice of assessment, or of a document under the hand of the Commissioner, a Second Commissioner, or a Deputy Commissioner, purporting to be a copy of a notice of assessment, shall be conclusive evidence of the due making of the assessment and, except in proceedings under Part IVC of the Taxation Administration Act 1953 on a review or appeal relating to the assessment, that the amount and all the particulars of the assessment are correct.

A further example is provided by section 22 of the *Product Grants and Benefits Administration Act 2000*:

The production of a notice of assessment under this Part is conclusive evidence:

- (a) that the assessment was properly made; and
- (b) except in proceedings under Part IV of the *Taxation Administration Act 1953* on a review or appeal relating to the assessment – that the amounts and particulars in the assessment are correct.

Similarly, subsection 33A(2) of the *Freedom of Information Act 1982* provides that:

- (2) Where a Minister is satisfied that a document:
 - (a) is an exempt document for a reason referred to in subsection (1)⁶; and
 - (b) is not a document containing matter the disclosure of which under this Act would be, on balance, in the public interest;
 the Minister may sign a certificate to that effect, specifying that reason.

while subsection 36(3) provides that:

Where a Minister is satisfied, in relation to a document to which paragraph (1)(a) applies, that the disclosure of the document would be contrary to the public interest, he or she may sign a certificate to that

⁶ That is, it:

- (a) would, or could reasonably be expected to, cause damage to relations between the Commonwealth and a State; or
- (b) would divulge information or matter communicated in confidence by or on behalf of the Government of a State or an authority of a State, to the Government of the Commonwealth, to an authority of the Commonwealth or to a person receiving the communication on behalf of the Commonwealth or of an authority of the Commonwealth.

effect (specifying the ground of public interest in relation to which the certificate is given) and, subject to the operation of Part VI, such a certificate, so long as it remains in force, establishes conclusively that the disclosure of that document would be contrary to the public interest.

There are many other examples of such clauses in Commonwealth legislation.

8. By way of a self-executing decision, that is, a decision where the 'decision' follows automatically

Such devices are most commonly used in relation to the continuation or suspension of fiscal entitlements.⁷

Subsection 57(2) of the *Safety, Rehabilitation and Compensation Act 1988* is illustrative:

Where an employee refuses or fails, without reasonable excuse, to undergo an examination...the employer's rights to compensation under this Act...are suspended until the examination takes place.

Another example of a self-executing or automatic decision is subsection 1282(6) of the *Corporations Act 2001* which provides that where:

- the ASC granted an application by a person for registration as a liquidator; and
- the person complied with relevant legislative requirements,

then the ASIC must issue the person with a certificate of registration.⁸

See also sections 189 and 190 of the *Migration Act 1985*. Section 189 provides that:

- (1) If an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer must detain the person.
- (2) If an officer reasonably suspects that a person in Australia but outside the migration zone:
 - (a) is seeking to enter the migration zone (other than an excised offshore place); and

⁷ The effect of such clauses can be to exclude judicial review by circumventing the need for a decision of an administrative character. In the case of *Buck v Comcare* (1996) 137 ALR 335 in considering this provision, Justice Finn of the Federal Court held that it did not authorise or require a decision of an administrative character to be taken. Suspension arose when the circumstances set out in the subsection occurred and by force of the subsection. Consequently, the court did not have jurisdiction under the AD(JR) Act. However, case-law in this area is not consistent. The finding in *Buck's* case was doubted by Tamberlin J in *Sash Trajkovski v Telstra Corporation* (1998) 153 ALR 248, 257 where it was concluded that 'it was essential that the Administrative Appeals Tribunal come to a conclusion as to the existence and limits of its jurisdiction'.

⁸ Sub-section 1280(5) makes similar provision with respect to auditors.

- (b) would, if in the migration zone, be an unlawful non-citizen; the officer must detain the person.
- (3) If an officer knows or reasonably suspects that a person in an excised offshore place is an unlawful non-citizen, the officer may detain the person.
- (4) If an officer reasonably suspects that a person in Australia but outside the migration zone:
- (a) is seeking to enter an excised offshore place; and
 - (b) would, if in the migration zone, be an unlawful non-citizen; the officer may detain the person.

Section 190 provides an objective a range of objective tests for section 189:

- For the purposes of section 189, an officer suspects on reasonable grounds that a person in Australia is an unlawful non-citizen if, but not only if, the officer knows, or suspects on reasonable grounds, that the person:
- (a) was required to comply with section 166; and
 - (b) did one or more of the following:
 - (i) bypassed, attempted to bypass, or appeared to attempt to bypass, immigration clearance;
 - (ii) went to a clearance officer but was not able to show, or otherwise did not show, evidence required by section 166 to be shown;
 - (iii) if a non-citizen, went to a clearance officer but was not able to give, or otherwise did not give, information required by section 166 to be given.

There are many other examples of such clauses.⁹

9. By amending the range and scope of judicial review

By virtue of the *Migration Legislation Amendment (Procedural Fairness) Act 2002*, a number of provisions of which the following is an example, were included in the Migration Act:

51A Exhaustive statement of natural justice hearing rule

(1)

This Subdivision is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with.

(2)

⁹ Other examples include section 95H (automatic grant of free time to certain parties) and 95L (grant of free time on applications in relation to the Senate) of the *Broadcasting Act 1942*, and sections 65 and 75 of the *Development Allowance Authority Act 1992*, relating to the granting of pre-qualifying certificates upon the application for transfer of benefits of a certificate and section 30D of the *Veterans' Entitlements Act 1986*.

Sections 494A to 494D, in so far as they relate to this Subdivision, are taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters they deal with.

APPENDIX 3

ALTERNATIVE REMEDIES

Two case studies

Taxation

The review scheme

In the taxation jurisdiction, provisions have been implemented to confine taxpayer challenges under Part IVC of the *Taxation Administration Act 1953* (TAA). These provisions include sections 175 and 177 of the *Income Tax Assessment Act 1936* (ITAA 1936) and paragraph (e) of Schedule 1 to the *Administrative Decisions (Judicial Review) Act 1977* (AD(JR) Act).

Despite the fact that resolution between the Australian Taxation Office (ATO) and a taxpayer can be dealt with by an objection and appeal process within the ATO, a taxpayer dissatisfied with a decision by the Commissioner can also either:

- apply to the Administrative Appeals Tribunal (AAT) for a review of the decision (handled by the Taxation Division of the Tribunal); or
- appeal to the Federal Court.

Alternatively, the taxpayer may elect that a matter be dealt with by the Small Taxation Claims Tribunal (which is part of the AAT) if the amount in dispute is less than \$5000.

Subsequently, the Commissioner or the taxpayer may appeal to the Federal Court from a decision of the AAT on a question of law. Often, the Court will refer the matter back to the tribunal to make appropriate findings of fact after it has decided on the question of law.

Additionally, a system of public and private rulings was introduced on 1 July 1992. This is an important element in the self-assessment scheme. A private ruling is a written expression of opinion by the Commissioner about the way in which a tax law or tax laws would apply to a person in relation to a particular arrangement in respect of a specified year of income. A public ruling enables the Commissioner to express his opinion on the way tax laws apply to arrangements and, by its nature, has a wider application than a private ruling. If the Commissioner provides a private or public ruling, it is legally binding to the extent that it is favourable to the taxpayer. Rulings not legally binding are treated as administratively binding.

Other noteworthy aspects of the review system include that:

- the taxpayer bears the onus of proof to establish that the assessment exceeds the amount of the taxpayer's true liability;
- the taxpayer needs to prove positively what changes need to be made in order to correct the assessment, as simply showing the assessment is somehow wrong will not suffice¹; and
- the taxpayer must show on the balance of probabilities that the assessment exceeds the amount of the taxpayer's true liability.

Significance of the review scheme from the executive perspective

The making of a taxation assessment is central not only to the collection of revenue but also to the issue of a notice that tax is due and payable and to the issuing of a departure order.

It is therefore not surprising that the legislature has sought to protect that process from disruption, primarily through sections 175 and 177 of the ITAA 1936.

Through such provisions, the legislature has aimed to insulate the assessment making process from review and give the Commissioner an evidentiary advantage in seeking to recover outstanding taxes.

Additionally, Schedule (1) (e) of the AD(JR) Act operates to exclude:

Decisions making, or forming part of the process of making, or leading up to the making of, assessments or calculations of tax, charge or duty, or decisions amending or refusing to amend, assessments or calculations of tax, charge or duty under [amongst others], the Income Tax Assessment Act 1936.

Arguments for limiting judicial review clearly include the potential to undermine the current tax collection system and the possibility that substantial resources would have to be devoted to defending judicial review proceedings.

Significance of the review scheme from the perspective of the taxpayer

Under the provisions set out in Part IVC of the TAA a taxpayer has:

- a right to seek review of the excessiveness of an assessment
- recourse to a specialised tribunal through the AAT, which has considerable expertise in the area of taxation; and

¹ *Trautwein v Federal Commissioner of Taxation (No 1)* (1936) 56 CLR 63; *McCauley v Federal Commissioner of Taxation* (1996) 39 ATR 1.

- recourse to the Federal Court which has considerable taxation expertise.
- Under these provisions the Commissioner is under a statutory duty to take whatever action is necessary to give effect to a decision by the AAT or Federal Court.

As noted by Brennan J in *Deputy Commissioner of Taxation of the Commonwealth of Australia v Richard Walter*:

The jurisdiction of the Federal Court on appeal or of the Administrative Appeals Tribunal on review of a decision or an objection extends to every issue which affects the amounts ultimately included in the taxable income or tax liability of a taxpayer.²

As a result of the *Richard Walter* case, in which subsection 177(1) was found to be consistent with the *Hickman* principle, judicial review proceedings can be instigated with respect to:

- allegations of bad faith;
- where the Commissioner has no power to make an assessment; and
- declaratory relief may be available where no assessment has been made.

Workplace Relations Appeal scheme

*The scheme*³

Under section 45(2) of the *Workplace Relations Act 1996* (the WRA) most decisions of the Australian Industrial Relations Commission can be appealed to the Full Bench but leave is required. In determining whether to grant leave, the Full Bench can take into account the usual special leave considerations and must, under section 45(2), grant leave if it is in the public interest to do so. Section 45(2) is not exhaustive of the special leave considerations, but rather creates an extra, mandatory, ground of public interest for granting leave.

In addition to the availability of appeals under section 45(2), under section 109 the Minister may apply for a review by a Full Bench of an award, order or decision of a single member if the Minister believes the decision is not in the public interest.⁴

A Full Bench has full merits review powers. That is, it may quash, confirm or vary the decision, make a new decision, or refer the matter back to a single

² *Deputy Commissioner of Taxation of the Commonwealth of Australia v Richard Walter Pty Limited* (1995) 183 CLR 168, 199.

³ All section references are to the *Workplace Relations Act 1996* unless otherwise specified.

⁴ *Workplace Relations Act 1996* section 109.

member.⁵ A Full Bench may review the decision where an applicant shows that the decision was not reasonably open to the commissioner, or some other judicial-review-type ground.⁶ The appeal is by way of a re-hearing of the case.⁷

The Commission may refer a question of law to the Federal Court which then allows for the usual appeal process through the courts.⁸ However, there is no appeal from a Full Bench.

A privative clause exists in section 150 of the WRA to protect a decision by the AIRC. The privative clause has been in the WRA, and the predecessor to that legislation since 1904. There does not appear to have been much direct re-consideration of the privative clause.

The privative clause does not operate to oust judicial review under section 75(v) of the Constitution where an applicant seeks a constitutional writ under that section.⁹ The original jurisdiction of the High Court is complemented by section 44(2A) of the *Judiciary Act 1903* (Cth) by allowing the High Court to remit constitutional writ matters back the Federal Court.¹⁰

Support for the scheme

The Courts have demonstrated their support for the WRA scheme. One of the main reasons for this is that the scheme insists on applicant's exhausting appeal rights in the industrial hierarchy which allows a review court the benefit of specialist opinions when making its own determination. As noted by Kirby P in *Boral Gas (NSW) Pty Ltd v Magill*:

1. It recognises and gives effect to the legislative scheme provide by Parliament for internal appeals...
2. It affords a place to the specialised tribunal which may have a superior advantage in ready knowledge of the developments of jurisprudence under scrutiny which this court does not initially enjoy. Furthermore, that tribunal frequently has a superior armoury of remedies at its disposal than this court can offer

⁵ *Workplace Relations Act 1996* section 45(7).

⁶ *Coal and Allied v Australian Industrial Relations Commission* (2000) 203 CLR 193, 204. *Amalgamated Metal Workers' Union v Gas & Fuel Corporation Mis 674/86 MD Print G5853*, Australian Industrial Relations Commission, 22 February 1985.

⁷ *Coal and Allied v Australian Industrial Relations Commission* (2000) 203 CLR 193, 204

⁸ *Workplace Relations Act 1996* section 46(1).

⁹ *R v Coldham; Ex parte Australian Workers' Union* (1983) 153 CLR 415.

¹⁰ *Re Printing and Kindred Industries Union v Nationwide News t/as Cumberland Newspaper Group* No NI 142 of 1994 (940003), Industrial Relations Court of Australia.

3. Whilst it may involve the possibility of additional cost or delay, it affords this court the advantage of having the opinion of the appellate tribunal should the tribunal determine the question of jurisdiction and should it still be the intention of the party to challenge jurisdiction
4. It allows complete exhaustion of any additional factor which may be relevant to establishing the facts said to ground jurisdiction, which facts may be more readily determined below than in this court...recognises the pressure of business in this court; and
5. It conserves to cases where no other remedy exists, the discretionary and exceptional remedies provided by the writs in the nature of the prerogative writs and recognises the pressure of business in this court, including the exercise of general supervisory jurisdiction.¹¹

The court in that case also referred with approval to the following comments made by Mason J with respect to jurisdictional challenges to decisions of the Australian Conciliation and Arbitration Commission:

If the evidence remains the same, if the Full Bench on appeal has confirmed the decision at first instance and if the issue of fact is one in the resolution of which the Commission's knowledge of industry specially equips it to provide an answer, greater weight will be accorded than in cases in which one or more of these factors is absent.¹²

¹¹ *Boral Gas (NSW) Pty Ltd v Magrill* (1933) 32 NSWLR 501.

¹² *R v Alley; Ex parte NSW Plumbers and Gasfitters Employee's Union* (1981) 153 CLR 376, 390.